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THE LAW
OF
COMPENSATION.

VOL. I.

THE LAW OF COMPENSATION:

WITH

APPENDICES OF FORMS, RULES AND ORDERS, Etc.

BY

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PREFACE.

THE work on Building and Engineering Contracts by the author, published in 1891 and 1895, dealt with one branch of law especially affecting Engineers, Architects and Surveyors.

Another and equally important branch of law on a kindred subject, viz., the Law of Compensation, forms the subject of the present work.

The method of arrangement has been to explain as far as possible the rules of law under the different sections of the statutes dealt with, and then to set out in chronological order a short digest of each case from which such rules have been deduced.

In this way the author has endeavoured to place before the reader, in a simple and intelligible form, every decision and statute which he could find relating to the law of compensation, besides giving an Introductory Chapter containing practical hints on procedure both before as well as after the special Act authorising the undertaking.

In a subject of this magnitude the labour involved has necessarily been very great, and has extended over six years; but the author is greatly indebted to Mr. H. E. Miller, Mr. W. A. Peck, Mr. S. Humphries (whose names are mentioned

on the title page), and to Mr. J. S. Henderson, of the Middle Temple, for their invaluable assistance at different stages of the work, as well as to Mr. Arnold Inman, of the Inner Temple, for preparing a very careful Table of Cases. To these colleagues and to those gentlemen who have kindly furnished him with transcripts of unreported cases, the author tenders his grateful acknowledgments.

The author trusts that the reception accorded to his previous work may be extended to the present volumes, which he has endeavoured to make reliable and exhaustive.

ALFRED A. HUDSON.

5, PAPER BUILDINGS, TEMPLE,

November, 1905.

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TABLE OF ABBREVIATIONS

OF THE

NAMES OF REPORTS CITED.



[1891] A. C . . .	Law Reports, Appeal Cases (1891 onwards).
A. & E. . . .	Adolphus and Ellis, Q. B. (1834—1841).
App. Cas. . . .	Law Reports, Appeal Cases (1876—1890).
Asp. M. C. . . .	Aspinall, Maritime Cases (1870 onwards).
Atk. . . .	Atkyns, Ch. (1735—1754).
B. & Ad. . . .	Barnewall and Adolphus, K. B. (1830—1834).
B. & Ald. . . .	Barnewall and Alderson, K. B. (1817—1822).
B. & C. . . .	Barnewall and Cresswell, K. B. (1822—1830).
B. & S. . . .	Best and Smith, Q. B. (1861—1870).
B. C. C. . . .	Lowndes and Maxwell, Bail Court (1852—1854).
Beav. . . .	Beavan, Rolls Court (1838—1866).
Bingham. . . .	Bingham, C. P. (1822—1834).
Bing. (N. C.) . . .	Bingham, New Cases, C. P. (1834—1840).
Bro. C. C. . . .	Brown, Ch. (1778—1792).
Burr. . . .	Burrows, K. B. (1756—1772).
[1891] Ch. . . .	Law Reports, Chancery (1891 onwards).
C. B. . . .	Common Bench Reports (1845—1856).
C. B., N. S. . . .	Common Bench Reports, New Series (1856—1865).
C. L. R. . . .	Common Law Reports (1853—1855).
C. P. D. . . .	Law Reports, Common Pleas Division (1875—1880).
Cab. & E. . . .	Cababé and Ellis, Nisi Prius (1882—1885).
Camp. . . .	Campbell, <i>Nisi Prius</i> (1808—1816).
Car. & K. . . .	Carrington and Kirwan, Nisi Prius (1843—1853).
Ch. Cas. . . .	Cases in Chancery (1660—1697).
Ch. D. . . .	Law Reports, Chancery (1876—1890).
Cl. & F. . . .	Clark and Finnely, H. L. (1831—1846).
Coll. C. C. . . .	Collyer, Ch. (1844—1846).
Cooper	Cooper's Reports, <i>temp.</i> Cottenham, Ch. (1846—1848).
Cox, C. C. . . .	Cox, Crown Cases (1843 onwards).
C. & M. . . .	Crompton and Meeson, Ex. (1832—1834).
Cr. & Ph. . . .	Craig and Phillips, Ch. (1840—1841).
Ot. Sess. Cas., 2nd Series .	Court of Session Cases (Scotch) (1838—1850).
" " 3rd " "	" " " (1863—1873).
" " 4th " "	" " " (1873—1898).
" " 5th " "	" " " (1898 onwards).

D. P. C.	Dowling, Practice Cases (1830—1841).
D. (N. S.)	Dowling, Practice Cases, New Series (1841—1843).
D. & L.	Dowling and Lowndes, Practice Cases (1843—1849).
D. & R.	Dowling and Ryland, K. B. (1822—1827).
De G. F. & J.	De Gex, Fisher and Jones, Ch., App. (1859—1862).
De G. & J.	De Gex and Jones, Ch., App. (1857—1859).
De G. J. & S.	De Gex, Jones and Smith, Ch., App. (1863—1865).
De G. M. & G.	De Gex, Macnaghten and Gordon, Ch., App. (1851—1857).
De G. & Sm.	De Gex and Smale, Ch. (1846—1852).
Dr. & Sm.	Drewry and Smale, Ch. (1859—1865).
Drew.	Drewry, Ch. (1852—1859).
East	East, K. B. (1800—1812).
El. & Bl.	Ellis and Blackburn, Q. B. (1852—1858).
El. Bl. & El.	Ellis, Blackburn and Ellis, Q. B. (1858).
El. & El.	Ellis and Ellis, Q. B. (1858—1861).
Eq. R.	Equity Reports (1853—1855).
Ex.	Exchequer Reports (1847—1856).
Ex. D.	Law Reports, Exchequer Division (1875—1880).
F. & F.	Foster and Finlason, N. P. (1856—1867).
Fl. & K.	Flanagan and Kelly, Rolls (Ireland) (1840—1842).
G. & D.	Gale and Davison, Q. B. (1841—1843).
Gale	Gale, Ex. (1835—1836).
Giff	Giffard, Ch. (1857—1865).
H. L. Cas.	Clark's House of Lords Cases (1847—1865).
H. & C.	Hurlstone and Coltman, Ex. (1862—1865).
H. & M.	Hemming and Miller, Ch. (1862—1865).
H. & N.	Hurlstone and Norman, Ex. (1856—1861).
H. & P.	Hopwood and Philbrick, Registration (1863—1868).
H. & R.	Harrison and Rutherford, C. P. (1866—1868).
H. & Tw.	Hall and Twells, Ch. (1849—1850).
H. & W.	Harrison and Wollaston, Bail Court (1835—1837).
Hare	Hare's Reports, Ch. (1841—1853).
Hodges	Hodges, C. P. (1835—1837).
[1894] I. R.	Irish Law Reports (1894 onwards).
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THE LAW OF COMPENSATION.

INTRODUCTORY CHAPTER RELATING TO PRACTICE AND PROCEDURE.

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PRELIMINARY.

WHEN lands are proposed to be taken for the execution of works in pursuance of Parliamentary powers, there are two stages of events to be considered.

First, What occurs before or during the passing of the special Act.

Second, What occurs after such passing.

This chapter is divided into five parts.

I. Proceedings before the passing of the special Act.

II. Proceedings after the passing of the special Act.

III. Short notes of the objects of other Acts in relation to the acquisition of land under Parliamentary powers.

IV. Short notes on underground (tube) railways.

V. Railway Fires Act, 1905.

I. PROCEEDINGS ANTECEDENT TO THE PASSING OF THE SPECIAL ACT.

These proceedings are governed by the Standing Orders of the House of Lords relative to Private Bills, and the Standing Orders of the House of Commons relative to Private Business.

The Orders of the two Houses of Parliament are very similar, although not quite identical in terms. They are published annually.

Standing Orders Nos. 1 to 55 in each case deal with the notices and applications to owners, &c., of lands, &c. ; together with the deposit of documents, and with plans, books of reference and sections.

SUMMARY OF STANDING ORDERS.

The following is a summary of the contents of as many of these Orders (with their headings) as refer to the subject of the present work :—

TWO CLASSES OF LOCAL OR PRIVATE BILLS.

1. These Bills, called “local” by the House of Lords and “private” by the Commons, are divided into 1st Class, which *inter alia* includes Bills relating to burial grounds, gas works, markets, church building, county halls and court houses, enclosing, draining and improving lands; and 2nd Class, which includes all other Bills authorising works.

2. This Order provides for the appointment of “examiners” who are officers of the several Houses, whose duties are to ascertain that the Standing Orders of the House in which the Bill is introduced have been complied with.

STANDING ORDERS COMPLIANCE WITH WHICH IS TO BE PROVED
BEFORE THE EXAMINERS.

Here follow definitions of “tramway,” “tramroad,” “railway,” “lessee,” “occupier,” “London,” “mechanical power.”

Notices by Advertisement.

3. This Order directs notice to be given of the intention to bring in a Bill; and provides for the particulars to be contained in the notice. *Inter alia*, notice must be given if the following powers are sought: compulsory purchase of land, &c., the imposition of an improvement charge on lands or houses.

4. In the case of Bills of the 2nd Class, and such 1st Class Bills in respect to which plans must be deposited, the notice must contain the names of parishes, &c., in which any work is intended to be executed, or any land to be taken; the particulars of any common, &c., land to be taken or used compulsorily; and also the time and place of deposit of plans, &c.

5. In the case of gas or sewage works, cemeteries, burial grounds, crematoria, destructors, hospitals for infectious disease, and generating stations, the notice must specify the lands on which these respective undertakings are intended to be erected.

6. This Order relates to street tramways, and also requires the gauge and motive power of tramroads to be specified.

7. Cuts, &c., from which it is intended to abstract water must be specified by name.

8, 8A. These Orders refer to Bills relating to letters patent.

9. The notice has to be published in either of the months of October or November, and not after November 27th, preceding the introduction of the Bill—

Once in the Gazette;

Twice in two successive weeks in local papers.

10. Refers to street tramways and underground railways.

Notices and Applications to Owners, Lessees, and Occupiers of Lands and Houses.

11. On or before December 15th preceding the introduction of the Bill, application must be made to owners, &c., of lands, &c., proposed to be taken compulsorily, or of lands, &c., to be affected by improvement charges, inquiring whether they assent, dissent, or are neuter in respect of the application.

12. Lists are to be made of assenting, dissenting and neuter owners, &c.

13. This Order refers to street tramways.

13A. On or before December 15th notice must be served on owners, &c., of railways, &c., interfered with by proposed tramways, giving time and place of deposit of plans, &c.

14. On or before December 15th notice must be given to owners, &c., of mills, &c., using waters of a stream, water from which is intended to be abstracted, giving time and place of deposit of plans, &c.

15. On or before December 15th, in case of gas or sewage works, &c., cemeteries, burial grounds, crematoria, destructors, and hospitals for infectious diseases, notice is to be given to owners, &c., of dwelling-houses within three hundred yards of the proposed works.

16. On or before December 15th, in the case of a bill for the relinquishment of any part of an authorised work, notice is to be given to the owners, &c., of lands in which such relinquished part is situate.

17. On or before December 21st, where a Bill alters or repeals protection clauses, notice is to be given to the parties affected.

18. This Order relates to compulsory running powers.

19. All applications and notices are to be served personally or sent by registered letter, and accompanied by a copy of the Standing Orders regulating petitions in opposition to Bills.

20. Service to be sufficiently proved by written acknowledgment of person served, or in case of service by post by post office receipt.

21. No service to be effected on Sunday, Christmas Day, Good Friday, or Easter Monday ; or before 8 a.m. or after 8 p.m., except in case of service by post.

22. This Order deals with consents of local and road authorities in case of tramways.

Documents required to be deposited, and the Times and Places of Deposit.

23. Deposits are not to be made on Sunday, Christmas Day, Good Friday, or Easter Monday ; or before 8 a.m. or after 8 p.m., except in the case of service by post.

Deposits on or before November 30th.

24. In case of 2nd Class Bills, 1st Class Bills where land, &c., may be taken or used compulsorily, and of all Bills imposing improvement charges, plans and books of reference and sections are to be deposited with the clerk of the peace. In the case of railways the one-inch ordnance map with the line of railway delineated thereon is also to be deposited.

25. The plans, books of reference, and sections are also to be deposited in the Parliament Office or the Private Bill Office, as the case may be.

25A. This Order relates to tramway Bills only.

25B. In case of Bills for the supply of electrical energy an ordnance map (at least one inch to mile) must be deposited at the Board of Trade.

25c. (House of Lords only.) In case of Bills for impounding, &c., of water a six-inch ordnance map showing the position of the reservoir, and, where the source of supply is a river, the catchment area, is to be deposited with the Local Government Board and at the Parliament Office.

26. This Order refers to tidal waters.

26A. This Order refers to banks, &c., of rivers.

27. In case of railway, tramway, and canal Bills the plans, &c. (and in case of railways, ordnance maps) are to be deposited with the Board of Trade.

28. Where any works or lands to be taken compulsorily are in London, so much of the plans, &c., as refer thereto are to be deposited with the London County Council.

29. Where works are to be made or lands, &c., taken compulsorily, plans, &c., are to be deposited with the town clerk, urban district council clerk, parish council clerk (if none, chairman), or chairman of parish meeting and rural district council clerk, as the case may be.

30. Where land of burial grounds, &c., or common lands are taken, plans, &c., are to be deposited with the Home Office, and in case of common lands, with the Board of Agriculture and Fisheries.

31. A copy of the Gazette notice (S. O. 9) is to be deposited with plans, &c.

Deposits on or before December 17th.

32. The petition for Bill is to be deposited in the Parliament or in the Private Bill Office, as the case may be, specifying powers of taking land compulsorily, interference with Crown, church, corporation, &c., property, diversion of water; making, &c., of waterways, and making, &c., of railways.

Deposits on or before December 21st in the case of the House of Lords, and December 18th in the case of the House of Commons.

33. Copies of all private Bills must be deposited at the Treasury, the Local Government Board, and the General Post Office, and at other Government offices according to their objects and scope.

34. Copies of all 2nd Class Bills relating to London are to be deposited with the London County Council.

Deposits on or before December 31st.

35. All estimates and lists of owners, &c., must be deposited in the office of the Clerk of the Parliaments or in the Private Bill Office.

35A. This Order deals with the deposit of documents in respect of joint-stock companies Bills (House of Commons only).

36. Copies of estimates of expense of undertaking and declarations of amount of rates and duties are required to be printed and delivered at the office of the Clerk of the Parliaments, or at the Vote Office and Private Bill Office.

37. This Order gives the form of estimate.

Deposits on or before December 21st.

38. This Order deals with special deposits where working class dwellings are proposed to be taken.

Deposits on or before November 30th.

39. Whenever plans, &c., are deposited in the case of a provisional order or provisional certificate, duplicates must also be deposited in the office of the Clerk of the Parliaments, or in the Private Bill Office.

*4. Plans, Books of Reference, Sections, and Cross-Sections.**Plans.*

40—45. These Orders provide for the form, contents, &c., of plans.

Book of Reference.

46. The book of reference is to contain the names of the owners, &c., of all lands, &c., which may be taken compulsorily or subjected to an improvement charge.

Sections.

47—55. These Orders provide for the form, contents, &c., of the sections and cross-sections.

CONSIDERATIONS BY THE LANDOWNER UPON RECEIPT OF A NOTICE OF
INTENTION TO APPLY TO PARLIAMENT.

Too much importance cannot be attached to the necessity for a claimant to consider carefully every step taken by him in connection with any undertaking seeking Parliamentary powers. The position of the landowner and of other persons affected may be made or marred according to the wise or unwise way in which his interests have been watched and dealt with in the earliest stages.

The first formal notification a landowner receives of any intended interference with his property is the notice required to be given by promoters of their intention to apply to Parliament for compulsory powers, and he should

at this stage have the Bill and deposited plans most carefully scrutinised in order that he may clearly understand the effect of the proposed undertaking upon his property.

Assent, Dissent, or Neutrality of Landowner.

Accompanying this Parliamentary notice there will be delivered a form with a request that the landowner should return it signifying his assent, dissent, or neutrality in regard to the scheme, in accordance with Order 11, *ante*; and unless there are strong and special reasons for returning himself as assenting to the scheme the landowner should generally return himself as dissenting.

Effect of Notice of Intention to apply to Parliament for Powers.

It should be observed that the receipt of a notice of an application to Parliament does not as a rule prevent the owner in any way from dealing with his property or in creating any fresh interest therein, but of course there are practical difficulties (see *post*, p. cxlix).

PETITION TO OPPOSE.

The next point for the owner (and (other persons interested : these are for convenience referred to under the word "owner") to consider is whether a petition should be lodged against the Bill, and in deciding as to this it will be well to bear in mind that it is much more likely that favourable consideration will be obtained at the hands of promoters before they have compulsory powers than when they have acquired them.

In the case of landed estates the planting of the banks of a railway, the provision of a station, the construction of means of communication beyond those which can be insisted upon as matter of right, and such-like concessions are very often of far more value to the owner than a mere money payment, and these are items which can often be arranged during the passage of a Bill through Parliament.

For example, if the land which is proposed to be acquired is used for agricultural purposes, but has a building value, the owner, if he did not obtain concessions before the passing of the Act, would only be entitled to such accommodation works as are requisite for agricultural purposes (*post*, p. 847).

Again, in the case of important business concerns it is often far more in the interest of their proprietors to secure reinstatement than to obtain a large money payment and be compelled to remove from a position with which the particular business has been identified for a number of years.

The Holborn and Strand improvements of the London County Council afford several instances of cases (such as the *Morning Post* Newspaper, the Gaiety Theatre, Short's Wine-house, &c.) where reinstatement has been arranged to the mutual advantage of the promoters and the landowners; and

the clauses inserted in the Act for the protection of those various owners may usefully be consulted on this head (*see* 62 & 63 Vict. c. cclxvi. ss. 40—44).

A further reason for an owner having a clear comprehension of the details of the proposed undertaking is to be found in the fact that the provisions of the general Acts are often varied by the special Act, and these variations may under certain circumstances press very hardly upon owners. Wherever this is so it is important that proper steps should be taken to bring the facts before the Parliamentary Committee and the promoters. For instance, in the case of a public body, there may be inserted a provision restricting compensation in regard to alterations or improvements made in property after a given date, antecedent to the notice to treat or even to the passing of the Bill. Or it may be sought to include an owner's property in the area upon which a betterment charge may be imposed, or to vary the 92nd section of the Lands Clauses Act to the promoters' advantage.

Briefly, if there be any damage which cannot be properly compensated for under the provisions of the general Acts, or where the owner might be adversely affected by the special Act, it will generally be found wise to raise the point at the earliest stage in the proceedings of the promoters in the form of a petition against the Bill. Although this course may not lead to the Bill being rejected, it may (and generally does) result in the owner obtaining valuable protective clauses.

Further, if the Standing Orders have not been complied with he may present a memorial complaining thereof, when he can be heard before the examiners, by himself, his agent, and witnesses. The memorial must be deposited in the office of the Clerk of the Parliaments before twelve o'clock on the day preceding that appointed for the examination, or in the Private Bill Office (S. O., H. L. 73, 75 ; H. C. 74).

Standing Orders as to Petitions to Oppose the Bill.

In the event of the owner deciding to oppose the Bill, the following provisions apply :—

In the case of the House of Commons the referees decide as to the *locus standi* of petitioners (H. C. 89).

The time for presenting such a petition to the Lords, in the case of local Bills originating in that House, is before three p.m. on February 19th and for provisional order confirmation Bills and all Bills brought from the House of Commons before three p.m. on the seventh day after the second reading (H. L. 92, 93).

Petitions to the Commons must be presented against private Bills originating in that House before February 12th, against provisional order confirmation Bills so originating not later than seven clear days after notice of the day of examination (unless of complaint arising later), against Bills brought from the Lords, or where compliance with Standing Order as to time of deposit of Bill

has been dispensed with, and certain Bills promoted by the London County Council, ten clear days after the first reading (H. C. 128).

All such petitions must be lodged in the Private Bill Office (H. L. 92, 93, 210; H. C. 128).

The petition must specify the grounds of opposition and petitioners are limited to those grounds (H. C. 127).

Petitions must be printed (H. L. 147).

Costs.

By the Parliamentary Costs Act, 1865 (28 & 29 Vict. c. 27), if the committee find the preamble not proved, or insert, strike out, or alter a protection clause, and unanimously report that a petitioner has been unreasonably or vexatiously put to expense in defending his rights, the petitioner becomes entitled to such costs as the committee award (sect. 1). If the committee decide that the preamble is proved and unanimously report that the opposition is vexatious the petitioner may be ordered to pay costs; but this does not apply to a landowner some of whose land is proposed to be taken, who *bond fide* opposes at his sole risk and charge (sect. 2). Costs against the promoters when the preamble is not proved are a charge on the deposit (sect. 8). By the Parliamentary Costs Act, 1871 (34 & 35 Vict. c. 3), these enactments are extended to provisional order confirmation Bills. Committees are in fact rather reluctant to give costs.

Fees.

The following fees are payable in the House of Lords:—

	£	s.	d.
Petition against Bill not praying to be heard	1	0	0
Petition against Bill praying to be heard	2	0	
For the first or first and second day on which an agent only appears in support of a petition	3	0	0
For every subsequent day	1	0	0
Order for leave for counsel to appear	1	0	0
For the first day on which counsel appears	10	0	0
For every subsequent day	4	0	0
Every witness examined before committee	0	2	0

The following fees are payable in the House of Commons:—

On the deposit of a memorial complaining that the Stand- ing Orders have not been complied with	1	0	0
On the deposit of a petition against a private Bill . .	2	0	0
For every day examiners inquire into the memorial . .	3	0	0
For every day, petitioners appear before committee or referees	2	0	0

II. PROCEEDINGS UNDER THE LANDS CLAUSES ACT AFTER THE PASSING OF THE SPECIAL ACT.

ORIGIN OF THE LANDS CLAUSES ACT.

The Lands Clauses Act, 1845, is one of a series of statutes passed between the years 1840 and 1850 having as their object the provision of a code of clauses which might be adopted in special Acts either *in extenso* or with modifications, thus obviating the necessity of setting them out at length in the special Acts, as had previously been the case. The Lands Clauses Act thus furnishes a code applicable to the taking of land under special Acts for public purposes. It applies to all undertakings of a public nature authorised by statute after May 8th, 1845, unless its provisions are either expressly varied or excepted by the Act authorising the particular undertaking (sect. 1).

INCORPORATION OF THE LANDS CLAUSES ACT.

The first point therefore to be considered in ascertaining the powers of a particular statutory undertaking is to see how, if at all, the special Act affects the provisions of the Lands Clauses Act; that is to say, it is necessary to see if the latter Act has been adopted in its entirety or with what modifications, for it is well to repeat that all the clauses and provisions of the Lands Clauses Act, so far as they are applicable, are, in effect, written into the special Act "save so far as they shall be expressly varied or excepted by any such Act."

Method of Incorporation.

It is important to consider, further, the manner in which the Act is incorporated. This is fully dealt with in sect. 5, and the notes thereto (*post*, p. 19). It may be pointed out, however, that groups of sections may be incorporated or excluded by incorporating or excluding the introductory headings to such groups *ipsissimis verbis*. Thus, if the special Act expressly excludes the provisions of the Lands Clauses Act "with respect to the purchase and taking of lands otherwise than by agreement," the whole of the sections following this heading—sects. 16—68 inclusive—will be excluded from the special Act. If, on the other hand, the incorporation or exclusion of the provisions of the Lands Clauses Act is effected otherwise than by employing the exact words of such introductory headings, it is a question of construction in each case as to what sections are either incorporated or excluded.

Groups of Sections.

From what has already been said it will have been gathered that the Act is divided up into groups of sections, each group being concerned with some particular branch of the subject. The following are the various groups:—

Sects. 2—5 relate to the construction of the Act and those incorporated;

Sects. 6—15 deal with the purchase of lands by agreement ;

Sects. 16—68 relate to the purchase and taking of lands otherwise than by agreement ;

Sects. 69—80 are concerned with the application of the purchase-money or compensation for lands taken ;

Sects. 81—83 contain provisions as to conveyances of land ;

Sects. 84—92 deal with the entry upon land by the promoters ;

Sects. 93 and 94 contain provisions as to small portions of intersected land ;

Sects. 95—98 deal with copyhold lands ;

Sects. 99—107 deal with common or waste lands ;

Sects. 108—114 relate to lands which are subject to mortgage ;

Sects. 115—118 contain provisions as to lands subject to rent-charges ;

Sects. 119—123 deal with lands subject to leases and tenancies ;

Sects. 124—126 provide for cases where certain interests in the land taken have by mistake been omitted to be purchased ;

Sects. 127—135 are headed “Sale of Superfluous Land” ;

Sects. 136—149 deal with the recovery of penalties ;

Sects. 150, 151 provide for access to the special Act being given to all parties interested.

If these various groups are carefully examined, it will be seen that they have not been very accurately arranged ; in several cases particular sections are included which have no real connection with the other sections in the *fasciculus*. For example, sects. 92, 123, 132—135 have no real connection with the groups in which they are placed, but are of general application.

PURCHASE BY AGREEMENT.

This subject is dealt with in sects. 6—15 (*see post*, p. 24). Promoters are empowered to purchase by agreement for a consideration in money, which may be either a gross sum or an annual rent-charge (sects. 6, 10, and sect. 2 of the Lands Clauses Act, 1860), lands authorised by the special Act to be taken, and which are required for the purposes of the undertaking. Contracts by corporations must, generally, be under their corporate seal (*see post*, p. 26).

It should be noted further that an agreement for the purchase of land will not include damage by severance from other land, unless it is expressly so provided (*post*, p. 52).

Conditions of Agreement to Purchase.

The agreement, to be binding under the Act, must be—

- (a) “Subject to the provisions of this and the special Act” ;
- (b) In respect of “lands by the special Act authorised to be taken” ;
- (c) In respect of lands “required for the purposes of such Act” ;

- (d) For an "absolute purchase";
 (e) "For a consideration in money," that is to say, for a gross sum or an annual rent-charge.

Contracts with Promoters before the Act is passed.

It sometimes happens that the promoters of an undertaking enter into agreements for the purchase of lands before they have obtained their special Act authorising the undertaking. Whether such contracts are binding on the company when it is formed has been much discussed. If they are specifically adopted in the Act no question can arise; but if they are not so recognised there may be a difficulty. A curious series of conflicting authorities on this question is collected on pp. 30 *et seq.*; but the proposition on p. 30 sets out what is conceived to be the result of the older authorities in the House of Lords, which, although they have been frequently criticised as being out of harmony with the ordinary law, are, as the judgments of the supreme appellate tribunal, binding decisions. Except, however, in the case of contracts entered into with the promoters of a railway under the Railways Construction Facilities Act, 1864, which are, by sect. 30 of that statute, made binding on the company as if they had been entered into by the company, a landowner who before the incorporation of a company has entered into a contract with its promoters for the sale of land would do well to insist upon having the contract scheduled to the incorporating Act.

Persons under Disability.

Persons under disability are entitled to sell and convey land to the promoters (sect. 7, *post*, p. 79), but in the case of such persons the amount of purchase-money or compensation to be paid for the lands purchased or taken is to be ascertained by valuation and paid into the bank for the benefit of those interested (sect. 9, *post*, p. 93).

Land for Extraordinary Purposes.

Promoters may, if authorised by their Act, purchase land for extraordinary purposes, and all parties who are enabled by the Act to sell and convey lands may do so for such extraordinary purposes (sect. 12, *post*, p. 102), but not more than the prescribed quantity may be purchased from persons under legal disability (sect. 14). Municipal corporations cannot sell land without the consent of the Treasury (sect. 15).

Land for Additional Stations.

Sect. 45 of the Railways Clauses Act (*post*, p. 817) empowers railway companies to acquire by agreement land, not exceeding the prescribed number of acres for extraordinary purposes, for additional stations, &c., and for making roads to the railway.

COMPULSORY PURCHASE, AND NOTICE TO TREAT.

Subscription of Capital.

As a condition precedent to putting in force the compulsory powers of purchase the whole of the capital, or estimated sum for defraying the expenses of the undertaking, must be subscribed under contract (sect. 16), a certificate of two justices certifying that the whole of the prescribed sum has been subscribed being sufficient evidence of the fact of such subscription. It is to be observed that this requirement as to the subscription of capital has no application to purchases by agreement (p. 109), nor where the undertaking contemplated is the extension of the undertaking of an existing company which is to furnish the necessary funds (p. 110).

Time for Compulsory Purchase.

The compulsory powers of the promoters must be exercised, if at all, within three years from the passing of the special Act, unless that Act prescribes any other time (sect. 123). This section does not apply to agreements outside the Lands Clauses Act (*see* p. 679).

Matters to be Considered by Landowner after the Passing of the Special Act.

As a rule, the first step after the Act has become law is the giving by the promoters to the owner of a notice to treat with a plan attached showing the land the promoters wish to acquire. At this stage considerations of the highest importance arise.

An owner should at once satisfy himself whether the promoters have power to acquire compulsorily the property included in the notice to treat. It is obviously important to the owner to know whether the promoters are, in their notice to treat, attempting to acquire property in respect of which they have not obtained compulsory powers.

A further important consideration, where a portion only of a property is sought to be acquired, is whether a counter-notice should be given to the promoters to take the whole property.

In deciding as to this, an owner must remember that if such a notice be given the promoters may elect to withdraw their notice to treat, and refrain from taking any of the property in question, and that if this be done and the promoters can carry out their undertaking without acquiring any of his property his claim for injurious affection will be confined within much narrower limits than would be the case if some of his land were taken. On the other hand, if the promoters are proceeding under the Light Railways Act and only take a portion of an owner's property, they will be entitled to ask the umpire to take into consideration, in fixing the compensation for the part taken, the benefit which accrues to the remainder of the property from the running of the light railway.

The proceedings with regard to the counter-notice are dealt with later.

NOTICE TO TREAT.

As has been already said, the first important step to be taken by the promoters who propose to take under their compulsory powers the land of other persons, is the service on such persons of a notice of intention to take the lands specified. This notice, called the notice to treat, must demand from the parties served—

- (1) Particulars of their estate and interest in the lands ; and
- (2) The claims made by them in respect thereof.

The notice must further state—

- (1) The particulars of the lands required by the promoters ; and
- (2) The willingness of the promoters to treat for the purchase of these lands, and as to the compensation to be made for damage occasioned by the execution of the works (sect. 18, *post*, p. 112).

What Property may be Purchased.

The term “lands” mentioned in sect. 18 does not include incorporeal hereditaments ; unless therefore their special Act empowers them to acquire such, as, for example, a right of way, the promoters cannot compel the landowner to grant it to them. But in the ordinary case the notice to treat may be given for the taking either of the freehold, or of a leasehold interest, or of a mortgagee’s interest, &c.

The following lands may be taken :—

- (a) Land shown on deposited plans, subject to certain limits of deviation.
- (b) Intersected land less than half an acre (sect. 94 of the Lands Clauses Act, 1845, *post*, p. 633).

To Whom the Notice to Treat to be Given.

The notice to treat must be given to all parties interested in the lands (*see* pp. 138 *et seq.*).

Time for giving Notice to Treat.

It must be given before the expiration of the period prescribed by the special Act for the exercise of the compulsory powers, or, if no period is there prescribed, within three years from the passing of the special Act (sect. 123).

The notice to treat may be given before the capital is subscribed, because serving of a notice to treat is not an exercise of compulsory powers (p. 154).

Service of Notice to Treat.

The notice to treat must be served personally upon the parties interested in the lands required, or left at their last usual place of abode if such can be found. In case any party interested is absent from the United Kingdom or cannot after diligent inquiry be found, the notice must be left with the occupier of the lands, or, if there is no occupier, affixed upon some conspicuous part of the

lands (sect. 19, *post*, p. 162). As to service on corporations *see* sect. 20 (*post*, p. 164).

Obligations created by Notice to Treat.

The giving of the notice to treat does not constitute an agreement of purchase and sale, but it enables the landowner receiving it to require the promoters to proceed to have the purchase-money and compensation fixed by one or other of the methods prescribed by the Act (*see* p. 152), while as against the landowner the notice to treat operates to prevent him creating any fresh interest in the land (*see* p. 156).

If the ownership in a property be transferred after notice to treat, the person to whom it is transferred will not be entitled to any greater compensation than would have been payable to the person who was the owner at the time of the notice to treat.

Compensation will not be paid for improvement of a property after notice to treat, but sufficient outlay may be made to keep it in repair.

Withdrawal of Notice to Treat.

The notice to treat cannot be withdrawn, revoked, or abandoned, unless with the landowner's consent, or unless he serves the promoters with a counter-notice under sect. 92 (*see* pp. 146 *et seq.*).

Failure to Treat or to agree Amount of Compensation.

If for twenty-one days after the service upon him of the notice to treat the landowner fails to state the particulars of his claim in respect of the land, or fails to treat with the promoters in respect thereof, or if the parties cannot agree as to the amount to be paid for the land to be taken, or the damage that may be done by the execution of the works, the amount of compensation is to be settled in the manner provided for settling cases of disputed compensation (sect. 1, *post*, p. 165).

THE CLAIM WHERE LAND IS TAKEN.

On receipt of the notice to treat the owner should consider—

- (a) Whether it is advisable to send in a claim. This is only necessary
 - (i.) if the claimant decides to have compensation assessed by arbitration.
 - (ii.) Where land has been taken under sect. 85.
 - (iii.) In cases of injurious affection of land where no land is taken; or
- (b) Whether he will wait for an offer under the seal of the company.

If the owner decides to send in a claim, it should be for the estimated value of the claimant's interest in the land proposed to be taken, and should also include every item of compensation for injury to his adjoining property that can at the time be foreseen by the claimant or his advisers.

Time for making Claim.

The claim must be made within twenty-one days of the notice to treat being served. If the owner requires more than the twenty-one days allowed for sending in his claim, he can only obtain an extension of time by the consent of the promoters, failing which he will incur the liabilities which attach to the neglect to send in a claim. These liabilities may be of great or little moment to him according to the provisions of the special Act, but, as a rule, failure to send in a claim within the twenty-one days is a matter of small moment if an owner is content to allow his claim to be tried by a jury, the only effect being that the promoters may forthwith proceed to summon a jury.

The Amount of the Claim.

First, for value of land taken : this varies in accordance with (i.) the interest of the claimant, whether it be the fee simple, a life interest, a reversion, or as the case may be ; (ii.) the nature of the property, whether freehold, leasehold, copyhold, or consisting of ground rents, or being licensed premises, &c., &c.

To arrive at the amount that should be claimed, the assistance of a valuer or surveyor will in most cases be necessary.

In fixing the amount to be inserted in the claim, regard must be had to the fact that, although a claim may be amended, it is generally disadvantageous to do so, and some Acts, such as those of the London County Council, render it necessary to obtain permission from the Court for such an amendment. This being so, it is advisable to take every care to include every head of claim to a proper extent, calculating the valuation of the claimant's interest on the basis of the value to him at the time of the notice to treat.

As a matter of custom, an addition of a certain percentage should be made to the value of the property taken (but *not* to any sum claimed for injurious affection), where the promoters are purchasing under compulsory powers. This percentage varies from 10 per cent. upwards, according to the nature of the property taken. Where the land has reached its true value and been applied to its most profitable user (such as building), 10 per cent. is generally accepted as being proper and sufficient, but where, for instance, land is clearly applied to some purpose giving it a present value below that which will arise in the future when it is put to some more profitable use although no actual calculation of this enhanced value is possible at the moment, it is customary to add more than ten per cent. as a solatium to the owner for the loss of the additional, but distant, value which attaches to the land of which he is being deprived.

Secondly, another subject of claim is for severance or for any other injurious affection of land other than that proposed to be taken.

And here it must be noticed that this item of claim may include damage by user of the works, as well as by reason of their execution (thus differing

from the case of injury to land, when no land belonging to the owner is taken). Vibration, noise, loss of amenities and privacy are all subjects for compensation in this case, as well as severance and injury to trade, the latter of which may give rise to a claim for what is (though hardly accurately) called reinstatement.

Accommodation Works.

The question of accommodation works and the result of severance where it arises also require to be carefully considered in sending in the claim. Apart from agreement, the promoters can only be ordered by the justices to give such means of access, &c., as may be necessary for the user of the severed land for the purpose to which it is applied at the time; and where, for instance, land applied at the moment to agricultural purposes is likely to be shortly in demand for building purposes, it is obviously necessary to assess the damage by severance, having regard to the fact that special injury may arise from the bridges over the railway, which the promoters may be compelled to give, being of insufficient width, &c., for building purposes, although sufficient for agricultural land.

Form of Claim.

The special Act must be carefully examined in case it should contain clauses dealing with the form of claim. For instance, the London County Council Acts generally contain a clause giving them power to require the tribunal which assesses the compensation to decide whether such proper and sufficient particulars of claim have been given as will enable them to make an offer, and providing also that if this has not been done the claimant shall lose his costs, even though the verdict or award be in excess of the sealed offer.

The following is an example of such a clause :—

“The Court or person to whom any question of disputed purchase-money or compensation under this Act is referred shall if so required by the Council award and declare whether a statement in writing of the amount of compensation claimed has been delivered to the Council by the claimant giving sufficient particulars and in sufficient time to enable the Council to make a proper offer and if they or he shall be of opinion that no such statement giving sufficient particulars shall have been delivered one half of the costs of the arbitration or as the case may be one half of the costs of the proceedings before the sheriff (including the costs of summoning, empannelling and returning the jury, and of taking the inquiry and recording the verdict and judgment therein) shall be defrayed by the person with whom the Council shall have such question and the remaining half shall be defrayed by the Council anything in the Lands Clauses Consolidation Act, 1845, to the contrary notwithstanding. Provided that it shall be lawful for any judge of the High Court to permit any claimant after seven days’ notice to the Council to amend the statement in writing of the claim delivered by him to the

Council in case of discovery of any error or mistake therein or for any other reasonable cause such error mistake or cause to be established to the satisfaction of the judge after hearing the Council if they object to the amendment and such amendment shall be subject to such terms enabling the Council to investigate the amended claim and to make an offer *de novo* and as to postponing the hearing of the claim and as to the costs of the inquiry and otherwise as to such judge may seem just and proper under all the circumstances of the case. Provided also that this section shall be applicable only in cases where the notice to treat under the Lands Clauses Consolidation Act, 1845, either contained or was endorsed with a notice of the effect of this section (62 & 63 Vict. c. cclxvi. s. 12).

Where the promoters are entitled to detailed figures they should be given under some such heads as are shown in the following example of a trade claim :—

<i>Claim.</i>	<i>£</i>
Value of interest in property (including allowance for forced sale)	
Fixtures and fittings	
Disturbance of business removal, advertising, &c., —— year's purchase of £——	
Loss on stock	
	£

If such a claim as the above were sent in to promoters having the special power before referred to of demanding particulars, they would in all probability ask for an inventory of the fixtures and also of the stock, and these should be furnished.

Apart from special provisions the Lands Clauses Act sets out what particulars should be given, and these will be found embodied in the forms given herein (Forms 12 and 14, pp. 1415 and 1418, *post*).

THE COUNTER-NOTICE.

A person who has received notice to treat for a part only of a house or other building or manufactory (as to what are included in these terms *see* pp. 604, *et seq.*), and who is willing and able to sell the whole thereof, is not bound to sell a part only but is entitled to require the promoters to take the whole (sect. 92). The owner of the property proposed to be affected exercises the power conferred upon him by sect. 92—a section which it is important to observe is sometimes excluded altogether in the special Act, or modified by a provision that a part only of the property may be taken if in the opinion of the arbitrators or jury such part can be severed from the whole without material

detriment (*see* p. 616)—by giving to the promoters what is called a counter-notice. This it is prudent to give in writing, although it is not necessary (*see* p. 628). It should be given as early as possible after the notice to treat (*see* p. 619). It can only require the promoters to take the whole of the particular building, and not a part less than the whole (*see* p. 624). The effect of giving a counter-notice is to suspend the notice to treat (*see* p. 620). On the receipt of the counter-notice the promoters may elect to assent to it—they are not, it seems, obliged to assent within any particular time provided they do so before the expiration of the time limited for the completion of their works (*see* p. 621)—or they may withdraw their notice to treat (*see* pp. 621, 622).

Time for Counter-notice.

The counter-notice should be served before any other step in the matter is taken, *e.g.*, the appointment of an arbitrator.

Negotiations for Settlement after Claim sent in.

When a claim has been sent in with reference to land taken or required to be taken it is usual for surveyors representing the respective parties to meet and discuss the claim with a view to settlement, and any correspondence or interviews to this end are generally rightly regarded as without prejudice, and are not referred to in subsequent proceedings unless there are exceptional circumstances. If these negotiations fail and the promoters have not taken possession of the land the next step will be the issue by the promoters of a notice of their intention to summon a jury, unless arbitration has been chosen by the claimant.

THE OFFER BY THE PROMOTERS.

With the notice by the promoters of their intention to summon a jury they make what is known as the sealed offer of the amount they are prepared to pay, which means an offer under the seal of the promoters.

Inasmuch as costs depend upon whether a claimant obtains a larger amount than the sealed offer, this renders the making as well as the consideration of the offer a very important part of the proceedings in the compulsory taking of lands.

In making the offer the promoters generally name such a sum as they are advised will probably slightly exceed the verdict or award, but under special circumstances the sealed offer will sometimes be a nominal one of, say, five shillings.

Though this sealed offer should not be communicated to the tribunal, it does sometimes appear to become known, and the fear of this might induce promoters to content themselves with a nominal offer and so take the burden of costs.

When this is so the claimant's course is clear, but where a substantial sealed offer has been made he requires to carefully consider his position.

He may accept the sealed offer at any time prior to the verdict of the jury, but if he does so after expenses have been incurred "he is not in a better position than if the verdict of the jury were given for the amount of the offer": *R.v. Westminster High Bailiff* (1903), 72 L. J. K. B. 600.

It is customary with promoters to pay the costs and fees of the claimant's solicitors and surveyors if a settlement be arrived at prior to the sealed offer, and a similar arrangement may sometimes be come to if the sealed offer is accepted immediately it is made, but this cannot be relied upon in all cases.

It sometimes happens that where the sealed offer is not a liberal one a settlement can be arrived at at the hearing, and this is a contingency that an owner should consider before deciding to accept an offer which he is advised is not quite as much as he ought to obtain.

There is no express provision making it obligatory on the promoters to make an offer to the landowner in the event of arbitration, but sect. 34 makes it practically incumbent upon them to do so, as otherwise they must inevitably bear the whole cost of the arbitration (*see* p. 247).

On the same principle that the offer should not be disclosed either to the arbitrators, in case of arbitration (*post*, p. 251), or to the jury, a valuation or deposit made pursuant to sect. 85 should equally not be disclosed.

Time for making the Offer.

In the case of arbitration the promoters must make the offer not later than when they appoint their arbitrator, otherwise they will be liable to pay the claimant's costs of the arbitration in any event.

In case of assessment by a jury the offer must be stated in their notice of intention to summon a jury (*see* p. 246).

Nature of the Offer.

The offer must be unconditional, and must be an offer of a definite sum of money which the promoters are willing to give for the owner's interest in the lands sought to be purchased and for the damage to be sustained by him by the execution of the works.

In cases under sect. 68 the offer should not be made later than the notice of time and place of holding the inquiry (if before a jury) or before the claimant has incurred any expense, in the case of arbitration.

Second Offer.

A second or further offer can only be made where proceedings before a jury have been initiated but proceedings by way of arbitration are afterwards substituted. In this case the offer must be made when the promoters nominate their arbitrator

CLAIM AND PROCEDURE UNDER SECT. 68.

This section provides for the ascertainment of compensation in cases where possession has been taken by promoters without any agreement between them and the landowner, or where lands not taken have been injuriously affected by the execution of the works of the undertaking. The damage must arise from an act authorised by the Parliamentary powers, otherwise the landowner's remedy is to bring an action.

If the compensation claimed exceeds 50*l.* the landowner has the option of having the amount assessed by arbitration or a jury. It is important to observe that under this section the initiative is upon the landowner to make a claim. If he desires to have the assessment effected by arbitration he must (1) give notice to this effect to the promoters ; (2) and in such notice he must state (*a*) the nature of his interest in the lands in question ; and (*b*) the amount of the compensation he claims. If the promoters do not agree to pay the amount so claimed within twenty-one days after the receipt of such notice, the amount is to be settled by arbitration. The landowner may, however, desire to have the amount of compensation assessed by a jury ; if so, he must give the promoters notice furnishing the like particulars as in the notice requiring arbitration. Unless the promoters in this case agree within twenty-one days to pay the amount claimed they must issue their warrant to the sheriff to summon a jury, or in default they are liable to pay the amount claimed, which may be recovered by action.

In order that the section may apply the land must be actually taken or injuriously affected (*see* p. 321). For instance, the promoters may have taken possession under sect. 85, and may be delaying to get the compensation money payable by them assessed. In such a case the landowner's most efficient remedy is to serve notice under sect. 68, which compels the promoters to proceed practically at once, for if the landowner has required them to summon a jury and they neglect to do so for twenty-one days, they are liable for the whole amount claimed, and their only possible defence is that the owner has no title to the property ; or if the landowner has required the compensation due to him to be settled by arbitration, and the promoters neglect when called upon to appoint an arbitrator, the landowner may appoint his arbitrator to act for both parties.

The cases under sect. 68 should be carefully considered, as there is perhaps no more difficult class of case, and generally it should be borne in mind that where no land is taken the injury must be one which the claimant suffers as the owner of a particular property and not merely as a member of the general public (*post*, p. clxix).

Where land is actually taken, the amount, form, &c., of the claim are dealt with at p. clvi., *ante*, and clxx., *post*.

TRIBUNALS FOR SETTLING COMPENSATION

Choice of the Tribunal,

This is a matter for careful consideration.

A claimant has the choice of two tribunals, *i.e.*, a jury or arbitrators. The claimant, however, should remember that if he does not demand more than 50*l.* he has no right to a jury or arbitration, but that his compensation will then be fixed by the justices.

In the same way a tenant for a year, or from year to year, must have his compensation for land taken assessed by justices, though in the case of a claim by him for injurious affection where possession of none of his land is required, and the amount exceeds 50*l.*, he is entitled to the choice of a jury or arbitration (*see post*, p. clxxv).

Special Jury.

Apart from special circumstances a special jury is generally a far more satisfactory tribunal than a common jury.

Different Tribunals.

There are five tribunals by which the compensation may be assessed. These are :—

I. ASSESSMENT BY JUSTICES.

This tribunal—two justices or a police magistrate—is applicable only when the compensation claimed does not exceed 50*l.* (sect. 22). Therefore any claim sent in, whether *bonâ fide* or not, exceeding that amount ousts their jurisdiction. Justices are also the proper and, indeed, exclusive tribunal to assess the compensation payable to persons who are required to give up possession and whose interest in the lands taken is not greater than that of yearly tenants, whatever the amount of their claim is (sect. 121, *post*, p. 665).

But, where a yearly tenant claims only for injurious affection and possession is not required, the justices' jurisdiction does not extend to assess the compensation in respect thereof where the claim exceeds 50*l.* (*see post*, p. clxxv).

In case of assessment by justices the costs are in their discretion.

II. ASSESSMENT BY ARBITRATORS OR UMPIRE.

Where the compensation claimed or offered exceeds 50*l.* and the landowner requires it, he may insist upon the *quantum* of compensation being settled by arbitration. To enable him to claim this tribunal he must give notice in writing to the promoters of his desire for arbitration. Such notice must state the nature of his interest and the amount of compensation claimed (sect. 23) Furthermore the notice signifying the claimant's desire for arbitration must be served upon the promoters before they have issued their warrant to the sheriff to summon a jury to assess the compensation (*ib.*).

Appointment of Arbitrators.

Where arbitration is the method selected for having the compensation assessed, the parties may either concur in the appointment of a single arbitrator to whom the dispute shall be referred, or, which is the more usual case, each party appoints an arbitrator. If one party fails to appoint an arbitrator for fourteen days after the dispute shall have arisen, and after a request to do so, the other party may appoint an arbitrator to act on behalf of both parties (sect. 25, *post*, p. 200). The appointment must be delivered to the arbitrator, if only one, or to each, if two are appointed, and the submission is made irrevocable unless by consent (*ib.*). If an arbitrator dies, or becomes incapable of acting, before the determination of the matter in dispute, the party who appointed him may nominate another in his place. If this is not done within seven days after notice in writing from the other party to do so, the remaining arbitrator may proceed to act alone in the arbitration.

Appointment of Umpire.

If more than one arbitrator has been appointed the arbitrators must, before they enter on the reference, nominate and appoint by writing an umpire to decide on any matters as to which they cannot agree, or which they may refer to him. If the umpire so appointed dies or becomes incapable of acting, the arbitrators are forthwith to appoint another in his place (sect. 27, *post*, p. 209). In making such an appointment the arbitrators must exercise their judgment in the matter; they cannot select him by mere chance, as by casting lots (*see* p. 209). If the arbitrators refuse or neglect to appoint an umpire, either party may apply to the Board of Trade to make the appointment (sect. 28, *post*, p. 212, and sect. 1 of the Lands Clauses (Umpire) Act, 1883, *post*, p. 753).

When Umpire's Duties arise.

Where a single arbitrator has been appointed and he dies or becomes incapable of acting before he has made his award, the parties must begin *de novo* and appoint another arbitrator (sect. 29, *post*, p. 212). Where one of two arbitrators refuses or neglects to act, the other may proceed as if he had been appointed sole arbitrator (sect. 30, *post*, p. 213). If the arbitrators fail to make their award within twenty-one days from the day when the last of the arbitrators was appointed, or within such extended period, if any, as they may have appointed, the matters referred to them must be determined by the umpire.

Declaration necessary by Arbitrators and Umpire.

Before either the arbitrators or umpire enter upon the reference each of them is required to make and subscribe before a justice of the peace the declaration set out in sect. 33 (*post*, p. 222), which declaration must be annexed to the award when made.

Powers of Arbitrators and Umpire.

In addition to other powers, they are entitled to call for books, &c., and may examine the parties and witnesses on oath (sect. 32, *post*, p. 220); they may furthermore, unless the submission excludes this, state a case for the opinion of the High Court on any point of law (*see* p. 218).

Time for making Award.

The award must be made by the arbitrator or arbitrators within the twenty-one days mentioned in sect. 31, or within the extended period for making the award, and in any case within three months from the time the question is referred to them (sect. 31, *post*, p. 214), unless, indeed, the Court, under the power given by sect. 9 of the Arbitration Act, 1889, has further enlarged the time (*see* p. 216). The umpire must make his award within three months from the time the arbitration devolved upon him (*see* p. 216), unless, again, the Court further enlarges the time. Failure to make an award within the proper time involves this consequence, that the question of compensation has to be determined by a jury (sect. 23, *post*, p. 183). The parties, however, may agree to extend the time either for the arbitrators or umpire.

Taking up the Award.

The promoters are under an obligation to take up the award, and they are bound to furnish to the landowner, on demand by him, a copy of the same at their own expense, and to allow it to be examined by such person at all times (sect. 35, *post*, p. 232).

Enforcing the Award.

The award may be enforced—

(1) By action; and this appears to be the proper method of proceeding, at all events where the question of liability is in dispute, as it has to be borne in mind that the function of arbitrators, jury, justices, or surveyors under the Act is solely the assessment of the *quantum* of compensation; they have no jurisdiction to deal with the question of the legal rights of the parties (*see* p. 241).

(2) Under the provisions of sect. 12 of the Arbitration Act, 1889, which provides for obtaining leave to enforce the award in the same manner as a judgment or order. This method would appear to be available where there is no dispute as to liability as distinct from the amount of compensation, or where the arbitration has not proceeded wholly under the Lands Clauses Act (*see* p. 241).

(3) The promoters may deposit the amount awarded and execute a deed poll under sect. 76 vesting the lands in themselves (*see* p. 241).

(4) By an action for specific performance (*see* p. 241).

Costs of Arbitration.

The whole of the costs of the arbitration, to be settled by the arbitrators, are to be borne by the promoters unless the sum awarded is the same or a less sum than that previously offered by the promoters, in which case each party must pay his own costs of the arbitration, while the costs of the arbitrators are to be borne by the parties in equal proportions (sect. 34, *post*, p. 224). If, however, during the course of the proceedings the promoters make any concession in addition to the money payment (as, for instance, by agreeing to carry out any particular work for the benefit of the claimant), the costs will fall upon them, even though the sum awarded may be less than the sealed offer.

Taxation of Costs.

By sect. 1 of the Lands Clauses (Taxation of Costs) Act, 1895 (*post*, p. 753), on application of either party the costs are to be settled by a master of the High Court.

III. ASSESSMENT BY JURY BEFORE SHERIFF.

Where the compensation claimed exceeds 50*l.*, and the landowner does not require the amount to be settled by arbitration, or if the arbitrators or umpire fail to make an award within the proper time (see *ante*, p. clxv.), the question must be decided by a jury (sect. 23, *post*, p. 183).

Notice of Summoning of Jury.

The duty of taking steps to have a jury summoned devolves upon the promoters (sect. 38, *post*, p. 243), but before they issue their warrant to the sheriff for this purpose they are required to give not less than ten days' notice to the landowner of their intention to cause a jury to be summoned.

As to offer by promoters see *ante*, p. clx.

Summoning of Jury.

The promoters issue their warrant to the sheriff or his *locum tenens* (sect. 39, *post*, p. 252), who thereupon summons a jury of twenty-four indifferent persons duly qualified to act as jurymen in the High Court, to meet at a convenient time and place not less than fourteen nor more than twenty-one days after the receipt of the warrant from the promoters; the place of meeting must not be more than eight miles distant from the lands in question (unless the parties otherwise agree), and the sheriff must forthwith notify the promoters of the time and place fixed (sect. 41, *post*, p. 258). At least ten days' notice of the time and place of the inquiry must be given in writing by the promoters to the other party (sect. 46, *post*, p. 263). From the jurors appearing, a jury of twelve is to be struck by the sheriff (sect. 42, *post*, p. 260).

The Inquiry.

The inquiry is to proceed before the sheriff and the jury. A special jury may be summoned at the request of either party (sect. 54). The claimant is deemed to be the plaintiff (sect. 43, *post*, p. 261). If, however, the claimant fails to appear, the inquiry is not to be proceeded with, but the compensation is to be assessed by a surveyor as hereinafter mentioned (sect. 47, *post*, p. 264).

Powers of Sheriff.

The sheriff upon the request in writing of either party may summon witnesses, and on the like request is to order a view of the lands in question by the jury or by any six or more of them (*ib.*).

Province of Jury.

The jury are required by the Act to deliver their verdict separately for the sum of money to be paid for the purchase of the lands required by the promoters and for damage by severance or injurious affection (sect. 49, *post*, p. 264). The verdict and judgment are to be recorded (sect. 50, *post*, p. 267).

The question to be tried by the tribunal is one solely of *quantum*, that is, the value of the claimant's interest.

Finality of Verdict.

The verdict and judgment are final and conclusive and cannot be questioned by *certiorari* if the jury acted within their jurisdiction, and had before them materials entitling them to find the verdict they did (*see* p. 269). The existence of jurisdiction ought to appear on the face of the proceedings (*see* p. 270).

Costs of Inquiry.

Where the verdict of the jury is for a greater sum than that offered by the promoters, all the costs are to be borne by the promoters; if, however, the verdict is for the same or a less sum than that offered, or the landowner has failed to appear at the inquiry, the costs of summoning, empannelling, and returning jury, of the taking the inquiry and recording the verdict and judgment, are to be borne in equal shares by the promoters and the landowner, and each party is required to bear his own costs incident to the inquiry other than as aforesaid (sect. 51). Typical bills of costs are given in Appendix F., *post*, p. 1571.

Taxation of Costs.

The costs are, on the application of either party, to be settled by a master of the High Court (sect. 52, *post*, p. 275, and sect. 1 of the Lands Clauses (Taxation of Costs) Act, 1895, p. 753, *post*).

Costs, how Recoverable.

Costs, where payable by the promoters, are recoverable by distress if not paid within seven days after demand; where payable by the landowner, they may be deducted from any purchase or compensation money payable to him, or if they exceed the amount awarded, they are recoverable by distress (sect. 53, *post*, p. 280).

IV. ASSESSMENT BY JURY IN HIGH COURT.

Under the Act the inquest could only be held before the sheriff (or his substitute) and a jury. An alternative tribunal was, however, given by sect. 41 of the Regulation of Railways Act, 1868 (*post*, p. 938), to which it is necessary to make reference. Under that section, where land is being taken compulsorily for the purposes of a public railway, the railway company or the landowner is entitled, at any time before the issuing by the company of their warrant to the sheriff, to apply to a judge of the High Court for an order for the trial of the question of compensation by a judge and jury, and the judge may make such order thereupon as he thinks fit. If he makes the order asked for, an issue is to be settled and is to be entered for trial and tried at such place as the judge shall direct, in the same manner as any issue joined in an ordinary action. The jury are to deliver their verdict separately for the value of the lands taken and for the compensation in respect of injurious affection, and except indeed that the judge presides instead of the sheriff, the procedure at the inquiry and the functions of the jury are the same as in the ordinary case under the Lands Clauses Act. Thus the verdict is final and a new trial cannot be ordered (*see* p. 271).

Costs.

Costs are governed by the same rules as in inquiries before a jury and the sheriff.

V. ASSESSMENT OF COMPENSATION BY SURVEYOR.

A fifth method of assessing compensation is by the valuation of a surveyor. This course is to be followed—(1) where the landowner is absent from the kingdom; (2) where he cannot after diligent inquiry be found; (3) where he has not appeared at the inquiry before the jury after due notice thereof (sect. 58, *post*, p. 284). The surveyor is nominated by justices on the application of the promoters (sect. 59, *post*, p. 284); and he must before making his valuation make and subscribe in the presence of the justices a declaration that he will to the best of his skill and ability execute his duty in the matter (sect. 60, *post*, p. 286). The surveyor is bound to make a fair and proper inspection of the lands in question to enable him to estimate their value (*see* p. 285). The valuation, to which must be annexed the justices' nomination of the surveyor and his declaration, must be preserved by the

promoters and produced on demand to all parties interested in the lands comprised in the valuation (sect. 61, *post*, p. 286). The expenses of the valuation are to be borne wholly by the promoters (sect. 62, *post*, p. 286).

BASIS OF COMPENSATION.

Hitherto the machinery for ascertaining the amount payable by the promoters to the landowner has been dealt with. The next point for consideration is the basis upon which that amount is arrived at. This is provided for by sect. 63, which enacts that the assessing tribunal is to have regard not only to the value of the land purchased or taken, but also to the damage, if any, to be sustained by the landowner by reason of the severance of the lands taken from his other lands or otherwise by reason of the injurious affection of these latter lands by the exercise of the promoters' powers.

The cardinal rule in estimating the value of the lands taken is to take their value to the owner at the date of the notice to treat (*see* p. 288), and the intention of the owner to use the land in a particular way must be considered (*see* p. 291), as must also the special fitness or adaptability of the land for the purpose of the special undertaking for which it is acquired (*ib.*).

Subjects for Compensation.

The special matters which may also be considered are set out in the notes to sect. 63 (*post*, p. 286); these include goodwill, injury to business by removal of premises, cost of reinstatement, the right to renew lease, &c. Those elements which may not be taken into consideration are stated at pp. 303 *et seq.*; these include the mere chance of getting a renewal of a lease, interest acquired after notice to treat, &c. As to the right to damages by reason of severance, the damage is the reduction in value, present or prospective, of the lands not taken by reason of that severance (*see* p. 309); it must be capable of being foreseen and not too remote (*see* p. 310).

Where no Land is taken.

In arriving at the compensation payable in any case, it is important to consider whether any of the claimant's land has been taken or not. Where none of his land has been taken, four conditions must be satisfied to entitle the claimant to compensation; these are—(1) the injury must be caused by reason of an act authorised by statute; (2) the injury must be such as would give rise to a right of action if the act causing it were not authorised by statute; (3) the injury must be caused by the execution of the works and not by their subsequent user; (4) the injury must be an injury to land and not merely personal.

Where Land is taken.

On the other hand, a claimant whose land has been taken is in a much more favourable position. In his case the rule that compensation can only be given for that which, unless authorised by the statute, would otherwise have been an actionable wrong, does not apply ; in other words, he is entitled to claim in respect of any injury caused by what is done on the land taken, as for example, by the user of the works and not their mere execution (*see* p. 322). The elements which may be taken into consideration in assessing compensation are set out on pp. 337 *et seq.*, and those which may not be taken into consideration are set out on pp. 345 *et seq.* Where compensation is recoverable under the Act, an action will not, as a rule, lie to recover the same, but the procedure pointed out must be followed (*see* pp. 349 *et seq.*).

APPLICATION OF PURCHASE-MONEY OR COMPENSATION.

The Act makes special provision on this subject. If the purchase-money or compensation payable by the promoters amounts to or exceeds 200*l.*, and the parties entitled have only limited interests, or are prevented from treating, or are unable to make a title, the amount is to be deposited in the bank, where it is to remain until it can be applied to some one or more of the following purposes : the purchase or redemption of land tax, the discharge of incumbrances affecting the land, the purchase of other lands to be settled upon the like uses, in removing or replacing buildings taken or injured, and in payment to any party absolutely entitled (sect. 69, *post*, p. 360). Until the money can be so applied under an order of the Court, it is to be invested, and the dividends paid to the persons entitled (sect. 70, *post*, p. 410). If the purchase-money or compensation is less than 200*l.*, but exceeds 20*l.*, it may either be paid into the bank, and applied in the same way as if it amounted to 200*l.*, or it may be paid to two trustees to be nominated by the parties entitled, the money and its produce to be applied by the trustees in the same manner as money paid into the bank ; in this case no order of the Court is necessary (sect. 71, *post*, p. 432). Sums not exceeding 20*l.* are to be paid to the parties entitled (sect. 72, *post*, p. 434). All sums payable under contract to persons not absolutely entitled are to be paid into the bank (sect. 73, *post*, p. 435). The Court is empowered to direct the application of the purchase-money or compensation in respect of leases or reversions (sect. 74).

VESTING OF LAND IN PROMOTERS UPON DEPOSIT.

When the promoters have deposited in the bank the agreed or awarded purchase-money or compensation for the land in question, the landowner, upon the demand of the promoters, is to convey the land to them, or as they shall direct. If he fails to do so, or if he fails to adduce a good title, the

promoters may execute a deed poll under their common seal, if they are a corporation, or under their, or any two of their, hands and seals if they are not, which has the effect of vesting the land in them absolutely and as effectually as if they had obtained a conveyance from the owner. The deed poll must contain—(1) a description of the lands in question ; (2) a recital of the purchase or taking by the promoters ; (3) the names of the parties from whom the lands were purchased or taken ; (4) the statement that the deposit has been made ; and (5) a declaration as to default having been made. The deed must be stamped with the same stamp as would have been necessary in the case of a conveyance of the land (sect. 75, *post*, p. 453). The same machinery—the execution of a deed poll—may be adopted for vesting the lands in the promoters if the owner of the lands refuses to accept the purchase-money or compensation when tendered, or if he neglects or fails to make out a title, or if he refuses to convey or release the lands, or cannot, after diligent inquiry, be found, or fails to appear on the inquiry, and the promoters have deposited the amount in the bank (sects. 76, 77, *post*, pp. 456, 460). Where the money has been so deposited the parties interested may apply in a summary way to the Court—the usual method being by summons—for an order for its investment or distribution, or for payment of the dividends thereof (sect. 78, *post*, p. 461).

Costs in Cases of Deposits.

Where money has been deposited by the promoters in the bank (except where the deposit has been occasioned by the wilful refusal or neglect of the person entitled to receive the money, or to make out a title to the lands or to convey them), the costs may be ordered to be paid by the promoters. These costs include those relating to the purchase or taking of the land, the investment, or of one reinvestment, obtaining the proper orders for payments of dividends and payment out of court (sect. 80, *post*, p. 472). The Court, however, has a wide discretion in the matter of costs in relation to all such matters, so far as they relate to proceedings in the Supreme Court, a discretion the exercise of which depends upon the circumstances of individual cases.

CONVEYANCES.

The Act, by sect. 81 (*post*, p. 547), sanctions the use of certain forms of conveyances, which are given in the schedule, but these forms are no longer in general use. Other forms are given in the Appendix to this book. The costs of conveyances are borne by the promoters (sect. 82, *post*, p. 549) ; the costs, if their amount is not agreed, are taxable by one of the taxing masters (sect. 83, *post*, p. 554).

ENTRY ON LANDS BEFORE PURCHASE.

Promoters cannot, as a rule, enter on lands which they require for their purposes, unless they have either obtained the consent of the landowner and occupier, or unless they have satisfied all interested in the lands by payment. They are liable to penalties for any unauthorised entry (sect. 89, *post*, p. 597). To the rule above stated there are two classes of exceptions. First, the promoters may, without having satisfied the foregoing conditions, enter for the purpose of surveying and taking levels of the land, or probing or boring to ascertain the nature of the soil, or setting out the line of works. They may do any or all of these things after they have given not less than three nor more than fourteen days' notice to the owners or occupiers of their intention to enter for such purposes, making compensation to the owners or occupiers for any damage thereby occasioned (sect. 84, *post*, p. 556). Secondly, they may enter and use the lands for the purposes of their undertaking before an agreement has been come to as to the price to be paid, or before this has been fixed by award or verdict, upon—(1) depositing in the bank the amount claimed, or the amount determined by a surveyor appointed for the purpose by two justices or a police magistrate, or, where a railway company are the promoters, nominated by the Board of Trade (*see* p. 564), as the value of the land; and (2) executing a bond with two sufficient sureties in a penal sum equal to that deposited, conditioned for payment to the landowner, or for deposit in the bank of the purchase-money or compensation money which may eventually be found to be payable by them (sect. 85, *post*, p. 562). In case the parties differ the sureties are to be approved by justices, or, in the case of railway companies, by the Board of Trade. Government departments are exempt from providing sureties.

Conditions Precedent to Entry.

Before the promoters can exercise the power of entry given by sect. 85, there must exist either an agreement for the sale and purchase of the land, which leaves the amount of the purchase-money undetermined, or the inchoate or imperfect contract which is constituted by a notice to treat (*see* p. 565). As Lord Cottenham expressed it in *Willey v. South Eastern Ry.*, (1849) 1 Mac. & G. at p. 68: "Under the 85th section it is only provided by what means the company may take possession of the land *identified by prior transactions.*"

This power of entry may, it seems, be exercised although the capital has not been subscribed as required by sect. 16 (*see* p. 570). If the special Act empowers the promoters to acquire an easement only, they may enter under sect. 85 upon depositing the value of the easement (*see* p. 577). They must deposit the value of the whole property before taking possession of any part if a valid counter-notice has been given to the promoters under sect. 92, requiring them to take the whole, following upon a notice to treat for part only (*see* p. 624).

The money deposited is to remain in the bank as a security for the parties interested, and upon the condition of the bond being fulfilled, the Court may order the deposit, or the funds in which it may have been ordered to be invested, to be repaid or transferred to the promoters (sect. 87, *post*, p. 590). Where, however, the condition of the bond is not satisfied, the Court has jurisdiction, on the application of the landowner, to order payment out of the deposit to him (*see* p. 596).

Refusal of Owner to allow lawful Entry.

Where the promoters are authorised to enter, but possession is refused by the landowner, the promoters may issue their warrant to the sheriff to deliver possession to the person named in the warrant as the person to receive possession, whereupon the sheriff is to deliver possession accordingly, and the cost of so doing is to be borne by the party who refused to give up possession (sect. 91, *post*, p. 600).

INTERSECTED LANDS.

It sometimes happens that the effect of the carrying out of the undertaking in the manner authorised is to leave on the hands of the landowner small pieces of land cut off from his other land, and thus practically useless to him. The Act provides that where such pieces of land are less in extent than half an acre the owner may require the promoters to purchase the same along with the other land required for the undertaking, unless the owner has other land adjoining that left, into which it might be thrown so as to be conveniently occupied therewith. If the owner has other land so adjoining he can call upon the promoters, at their expense, to throw the small piece of land into such adjoining land by removing the fences, levelling, and soiling the site (sect. 93, *post*, p. 630). The provisions of this section are not applicable in the case of land in a town, or which is built upon. It may be, too, that similar pieces of land are left on each side of the works, and that the promoters would be compelled to make a bridge or other communication between the two intersected portions. In such a case, the promoters may insist upon purchasing them, if the piece on either side of the undertaking is less than half an acre, or is of less value than the expense of making the necessary communication between the two (sect. 94, *post*, p. 633). In the case of railway companies, however, such communications may be required if they can be brought under the head of accommodation works (*see* p. 634).

COPYHOLD AND COMMON LANDS.

The Act contains various provisions as to these lands : as to the conveyance and enfranchisement of the copyholds, the apportionment of rents, and as to the satisfaction of all those having an interest in common lands (sects. 95—107, *post*, p. 635).

LANDS IN MORTGAGE.

The promoters may redeem any mortgages on the land taken by them, whether they have previously purchased the equity of redemption or not (sect. 108, *post*, p. 649). In addition to principal, interest, and costs, mortgagees are entitled to six months' notice of the intention to redeem, or six months' additional interest in lieu of such notice (*ib.*). If the promoters enter on the land without having settled with the mortgagees, and depreciate the security, they may be restrained by injunction from proceeding with the works (*see* p. 651); if they ignore the rights of mortgagees, they do so at their peril (*see* p. 652). If the mortgagee refuses to accept the principal, interest, and costs when tendered, or fails to make out a good title, the promoters may deposit the amount in the bank, and execute a deed poll vesting the mortgagee's interest in themselves (sect. 109, *post*, p. 652).

It may happen that the amount due to the mortgagee exceeds the value of the land taken by the promoters. In such a case, failing agreement as to the value of the land, the amount must be determined in the usual way, a notice to treat being given to the mortgagee. The amount when ascertained must be paid or tendered to the mortgagee in satisfaction *pro tanto* of the debt, and he thereupon is required to convey or release his interest in the lands (*see* p. 653). If the amount is refused on tender the promoters are entitled to deposit it and execute a deed poll vesting the land in themselves (sect. 111, *post*, p. 655). Of course, the rights of the mortgagee remain in force against the mortgagor, except as against land taken (*see* p. 655). Again, it may happen that part only of the mortgaged land is taken by the promoters. In this case, where the part taken is of less value than the amount due on the mortgage and the part not taken is not a sufficient security to the mortgagee, the value of the land taken and the compensation in respect of severance must, failing agreement, be determined in the usual way, and the mortgagee receives that amount in satisfaction *pro tanto* of his mortgage debt, a memorandum of the amount so received by him being indorsed on the mortgage deed (*see* p. 656). The same procedure as before is open to the promoters, viz., deposit and the execution of a deed poll if the mortgagee refuses to accept the sum tendered (sect. 113, *post*, p. 656). If the mortgagee is paid off before the time stipulated in the mortgage deed he is entitled to receive in addition to his principal (*a*) the costs of reinvestment and (*b*) if the reinvestment results in a reduction of the rate of interest, compensation in respect of such loss (*see* p. 659).

RENT-CHARGES.

Provision is made by sects. 115—118 (*post*, p. 659) as to the release of lands from rent-charges.

LEASES.

Where part of lands comprised in a lease is required by the promoters, the rent payable is to be apportioned between the lands actually required and the residue of the lands. In default of agreement between the lessor and lessee and the promoters the apportionment is to be settled by two justices (*see* p. 663), the apportioned rent being payable from the date when the apportionment is made (*see* p. 664). The lessee in such cases is entitled to compensation from the promoters in respect of severance or injurious affection during his tenancy (*see* p. 665), and so is the lessor on his reversion.

YEARLY TENANCIES.

Where the lands are in the possession of a person having no greater interest than as tenant for a year, or from year to year, and he is required to give up possession before the expiration of his term or interest therein, he is entitled to compensation for the value of his unexpired interest and for any just allowance which ought to be made to him by an incoming tenant and for any loss or injury he may sustain, or for damage by severance or injurious affection if part only of his interest is required (sect. 121, *post*, p. 665). This section applies to all tenancies in which the tenant's interest at the time possession is required or taken has less than a year to run, or is that of a tenant from year to year (*see* p. 667). Of course a tenant is not entitled to compensation if he holds under a tenancy which is determined by a regular notice to quit expiring before possession is required (*see* p. 669). Neither is a tenant entitled to compensation for loss of profits caused by the execution of the promoters' works in respect of any period after the date fixed for him to give up possession to the promoters (*see* p. 671).

It is to be particularly observed that a notice to treat is not equivalent to a notice requiring possession, and a tenant is not entitled to have compensation assessed under sect. 121 until he has received a notice requiring him to give up possession before the expiration of his term or interest (*see* p. 671).

Sect. 121, moreover, only applies to the case of a tenant who is required to give up possession; any claim he may have in respect of land injuriously affected, but possession of which is not required, must be assessed under sect. 68, by arbitration or a jury where the claim exceeds 50*l.*, and by justices where it does not exceed that amount. The same applies with regard to a claim for severance from and the injurious affection of adjoining land, the interest in which is not within sect. 121 (*see* p. 673). The compensation payable under sect. 121 is assessed by justices, whose functions in the matter are limited to determining (1) whether or not the tenant has been required to give up possession, and (2) the amount of compensation (*see* p. 674).

INTERESTS OMITTED TO BE PURCHASED.

Where the promoters have taken possession of land required for the purposes of their undertaking and have omitted by mistake or inadvertence to satisfy the estate, right, or interest of some party therein, they are entitled to remain in possession, but they are obliged to pay compensation and mesne profits to such party within six months after notice of his claim, or, in case of dispute, within six months after its settlement in his favour (sect. 124, *post*, p. 681). The compensation in such a case is to be assessed on the basis of the value of the land when entered upon by the promoters (sect. 125, *post*, p. 684).

SUPERFLUOUS LAND.

Lands which have been taken compulsorily, but which are not required for the purposes of the undertaking, must be sold within the period prescribed by the special Act, or if no time is there prescribed, within ten years after the time limited for the completion of the works.

If the promoters make default in so doing the land unsold vests in the owners of land adjoining thereto in proportion to the extent of their lands adjoining (sect. 127, *post*, p. 686). Land taken for extraordinary purposes is not subject to this requirement (*see* p. 688).

But before the sale of lands as superfluous is carried out certain persons are given by sect. 128 (*post*, p. 702) rights of pre-emption in respect of the same. Such lands, unless they are situate within a town or are built upon or used for building purposes are first to be offered to the person then entitled to the lands (if any) from which the same were originally severed; if he cannot be found or refuses to purchase, they are to be offered to the person or to the several persons whose lands immediately adjoin the superfluous lands. If several persons are entitled to the right of pre-emption the promoters may settle the order in which the lands may be offered to them.

The right of pre-emption, which must be exercised within six weeks of the offer (sect. 129, *post*, p. 708), exists before the promoters dispose of the lands, and arises on an attempt to dispose of them (*see* p. 704); but land is not "disposed of" in this sense when it is applied to another authorised undertaking (*see* p. 705). Any difference as to the price to be paid for the purchase of such land is to be settled by arbitration (sect. 130, *post*, p. 709).

LANDS SUBJECT TO RATES.

Where the lands taken by promoters are subject to land tax or poor's rate the promoters are liable to make good any deficiency in the assessments until their works are completed and actually assessed (sect. 133, *post*, p. 712).

MISCELLANEOUS PROVISIONS.

Summonses or notices which may have to be served upon the promoters should be left at or posted to their principal office, or posted to their secretary, or to their solicitor if they have no secretary (sect. 134, *post*, p. 718).

Where any trespass or irregularity has been committed in the execution of the Act, amends may be tendered in satisfaction (sect. 135, *post*, p. 721).

Penalties are recoverable before justices (sect. 136, *post*, p. 721), and where these are recoverable by distress, this may be levied on the goods of the promoters or in certain cases on the goods of their treasurer (sects. 138, 140, *post*, pp. 722, 723).

No proceeding in pursuance either of the Lands Clauses Act or the special Act is to be quashed for want of form or removed into the High Court by *certiorari* (sect. 145, *post*, p. 724). But notwithstanding the provisions of this section *certiorari* will lie if there has been an excess of jurisdiction or if there is error on the face of the proceedings (*see* p. 725). Misdirection by a sheriff to the jury, or even a perverse verdict, are not adequate grounds for granting a *certiorari* (*ib.*). If justices who have adjudicated or the sheriff who has presided at the inquiry by a jury are disqualified and this was not known to the party objecting, *certiorari* will issue.

ACCESS TO SPECIAL ACT.

A copy of the special Act is to be kept by the promoters in their principal office and (in the case of railways and similar companies) a copy deposited with the clerk of the peace of each of the counties in which the works of the promoters extend (sect. 150, *post*, p. 733). All persons interested are to be entitled to inspect the Act and make extracts from or copies thereof (*ib.*). Failure to give such access to the special Act exposes the promoters to penalties (sect. 151, *post*, p. 734).

III. SHORT NOTES OF THE OBJECTS OF OTHER ACTS IN RELATION TO THE ACQUISITION OF LAND UNDER PARLIAMENTARY POWERS.

1. ACTS AS TO TAKING LANDS GENERALLY.

INCLOSURE ACTS, 1852, 1854.

These Acts deal with the application of compensation for common rights paid under the Lands Clauses Consolidation Act, 1845.

THE LANDS CLAUSES CONSOLIDATION ACTS AMENDMENT ACT, 1860.

This extends the power of selling land for the consideration of a rent-charge, and by sect. 7 gives the Secretary of State for War power to use the powers given to promoters by the principal Act.

LANDS CLAUSES CONSOLIDATION ACT, 1869.

This deals with lands in Westminster, substituting the high bailiff for the sheriff.

COMMONABLE RIGHTS COMPENSATION ACT, 1882.

This provides for the application of compensation where common lands are compulsorily acquired.

LANDS CLAUSES (UMPIRE) ACT, 1883.

This Act provides for the appointment of an umpire by the Board of Trade where the arbitrators have made default in making an appointment.

LANDS CLAUSES (TAXATION OF COSTS) ACT, 1895.

This Act regulates fees for taxing costs in compensation inquiries.

2. STATUTES RELATING TO RAILWAYS.

THE RAILWAYS REGULATION ACT, 1842.

Sect. 10 of this Act deals with fences, but seems to be superseded by the provisions in that behalf in the Railways Clauses Act, 1845. Sect. 14 gives powers to railway companies to enter on adjoining land for the purpose of repairing accidents, making full compensation to the owner. Sect. 15 gives an extension of the powers of taking land compulsorily where the Board of Trade deem this necessary for safety.

THE RAILWAYS CLAUSES CONSOLIDATION ACT, 1845.

This Act, by sect. 6, makes the construction of the railway and the taking of lands subject to the provisions of the Lands Clauses Act, 1845. It however, in addition, deals specially with the crossing of and other interference with roads. It imposes on companies the duty of efficiently fencing off their railway from adjoining lands, and provides for the case of mines, the working of which might endanger the railway, in which case the company can prevent such working, paying compensation to the mine owner for the interference with his right to work. The Act also deals with branch railways and sidings and the provision of works for the accommodation of owners.

THE ABANDONMENT OF RAILWAYS ACT, 1850.

This provides for a railway company obtaining a warrant to abandon their railway and the payment of compensation to landowners and others consequent thereon.

THE RAILWAYS CLAUSES ACT, 1863.

By this Act a railway company is prevented from acquiring land belonging to another railway company, but is allowed to acquire an easement over it. The Act also provides for an extension of time and extra compensation for additional damage caused thereby. In case of amalgamation, the Act extends remedies against the old companies to the amalgamated company.

THE RAILWAYS CONSTRUCTION FACILITIES ACT, 1864.

This gives power to construct railways under certificate from the Board of Trade, and incorporates the Railways Clauses Acts, 1845 and 1863, in the certificate. It also enables the promoters to make binding provisional contracts for the purchase of the land required.

THE RAILWAY COMPANIES ACT, 1867.

This Act protects rolling-stock from execution. It enables companies to file a scheme of arrangement which bars suits against them except by leave of the Court. It provides for abandonment where three-fifths of the capital is not subscribed, and amends sect. 85 of the Lands Clauses Act, 1845, as regards railway companies, giving the appointment of the surveyor to the Board of Trade instead of to justices.

THE REGULATION OF RAILWAYS ACT, 1868.

By this Act power is given to justices to order trees which are dangerous to the railway to be cut down, and to assess the compensation to the owner. It also provides for the assessment of compensation in certain cases by a High Court judge and jury instead of the sheriff and a jury.

THE ABANDONMENT OF RAILWAYS ACT, 1869.

This Act amends the Abandonment of Railways Act, 1850, as to notices.

THE REGULATION OF RAILWAYS ACT, 1873.

This Act refers differences between railway and canal companies to the jurisdiction of the Railway and Canal Commission, and makes regulations in that behalf.

THE PARLIAMENTARY DEPOSITS AND BONDS ACT, 1892.

This Act deals with the release of deposits, and the charge of compensation money thereon.

THE LIGHT RAILWAYS ACT, 1896.

This Act deals with the construction of light railways. The principal departures from the provisions of the Lands Clauses Act are—(i.) that the assessment of compensation is by arbitration and not also by a jury ; (ii.) that the promoters may require the arbitrator to take in consideration, as a set-off to compensation, any increased value which may accrue to adjoining land of a claimant by reason of the construction of the light railway. There is also special provision as to the costs payable by promoters.

THE RAILWAYS (ELECTRICAL POWER) ACT, 1903.

By this Act companies are given power to acquire land for electrical works.

3. ACTS RELATING TO GAS, WATER, AND ELECTRIC LIGHTING.

THE GAS WORKS CLAUSES ACT, 1847.

This incorporates part of the Railways Clauses Act, 1845, and provides that the undertakers are not to be exempted from proceedings for nuisance.

THE WATERWORKS CLAUSES ACT, 1847.

This incorporates part of the Railways Clauses Act, 1845, and contains similar provisions as to mines, but as regards accommodation works these are only to be given where provided for by the special Act.

THE GAS AND WATERWORKS FACILITIES ACT, 1870.

This provides for the exercise of powers sanctioned by provisional order.

THE GAS WORKS CLAUSES ACT, 1871.

This extends the provision that gas companies are not exempted from proceedings for nuisance.

THE ELECTRIC LIGHTING ACT, 1882.

This incorporates the Lands Clauses Acts, 1845, 1860, and 1869, except as to the acquisition of lands otherwise than by agreement, and as to entry on land. It also provides that compensation for damage shall be assessed by arbitration, and that the right to work mines under roads in which electric wires are laid shall not be curtailed.

THE ELECTRIC LIGHTING (CLAUSES) ACT, 1899.

This Act contains in the schedule clauses to be incorporated in Electric Lighting Acts.

4. MISCELLANEOUS CLAUSES ACTS.

These are the Cemeteries Clauses Act, 1847 ; the Harbours, Docks, and Piers Clauses Act, 1847 ; the Markets and Fairs Clauses Act, 1847 ; and the General Piers and Harbours Act, 1847. These do not call for any special remarks.

5. ACTS AS TO TAKING OF LAND FOR GOVERNMENT PURPOSES.

(i.) For Naval and Military Purposes.

THE ADMIRALTY (SIGNAL STATIONS) ACT, 1815.

This Act has two noteworthy points : it authorises the taking of land "for such time or term of years as the public service shall require," and directs that compensation shall be assessed by a jury with an appeal to the Court of Exchequer (now the King's Bench Division of the High Court).

THE DEFENCE ACT, 1842.

This Act authorises the taking of land for such time as the exigence of the public service shall require. The provisions as to assessment of compensation are superseded by those contained in the Defence Act, 1860, where the amount of compensation claimed is under 200*l.* ; otherwise, it is to be assessed by a jury with an appeal as under the Admiralty (Signal Stations) Act. By the Ranges Act, 1891, the authority acquiring land may require compensation to be assessed by arbitration.

THE DEFENCE ACT, 1854.

This extends the powers of the Defence Act, 1842, to common lands.

THE COASTGUARD SERVICE ACT, 1856.

This authorises the Admiralty to acquire lands for coastguard stations.

THE DEFENCE ACT, 1859.

This extends the powers of the Defence Act, 1854, to rights of common, &c., over lands the soil of which is vested in the Secretary of State for War.

THE DEFENCE ACT, 1860.

This directs compensation, where over 200*l.* is claimed, to be assessed by a jury as under the Defence Act, 1842 ; where under 200*l.*, by justices ; and in case of absent parties, by a surveyor appointed by justices. By the Ranges Act, 1891, the authority acquiring land may require compensation to be assessed by arbitration.

THE ADMIRALTY LANDS AND WORKS ACT, 1864.

This gives to the Admiralty power to take land by agreement, and incorporates the Lands Clauses Acts, 1845 and 1860, except so far as they relate to taking lands otherwise than by agreement. It further provides for the compulsory acquisition of lands by the Admiralty under special Acts incorporating the Lands Clauses Act, but gives to the Admiralty power to withdraw a notice to treat within two months, and exempts them from giving bonds as required by the Lands Clauses Act, 1845.

THE MILITARY FORCES LOCALISATION ACT, 1872.

This Act incorporates the Lands Clauses Acts, 1845, 1860, 1869, and authorises the Secretary of State to introduce a Bill giving compulsory powers of purchase of land.

THE MILITARY TRAMWAYS ACT, 1887.

By this Act the Secretary of State is enabled to obtain power by provisional order confirmation Act for the compulsory purchase of land for tramway purposes.

THE RANGES ACT, 1891.

This Act gives power to the authority acquiring land under the Defence Act, 1842, and amending Acts, to require compensation to be assessed by arbitration, and enacts that then the provisions of the Lands Clauses Acts, 1845 to 1883, in that behalf shall apply.

THE MILITARY LANDS ACT, 1892.

This incorporates the Lands Clauses Acts, 1845 to 1883, except sects. 16 and 17 and the provisions as to access to the special Act. It gives power to the Secretary of State, volunteer corps with his sanction, and county and borough councils, to purchase land for military purposes. It provides for the holding of a local inquiry where the Secretary of State is not the purchaser, and it empowers the Secretary of State to enter on lands to provide alignment marks on the coast.

THE NAVAL WORKS ACT, 1895.

This extends to the Admiralty the powers of the Secretary of State under the Defence Acts and the Military Lands Act.

THE MILITARY MANŒUVRES ACT, 1897.

This provides for the holding of manœuvres, and that compensation is to be settled by compensation officers; or if the claimant is not satisfied, by arbitration under the Arbitration Act, 1889.

THE NAVAL WORKS ACT, 1899.

This extends to the Admiralty the powers of the Secretary of State to take lands for tramway purposes.

THE MILITARY LANDS ACT, 1900.

This Act extends the meaning of "land" in the Military Lands Act, 1892, so as to include the bed of the sea and tidal waters, and any right of interference with the free use of land, and directs that the period of three years for the compulsory taking of land shall be calculated from the passing of the particular provisional order confirmation Act, and not from the passing of the Military Lands Act, 1892.

(ii.) For Civil Purposes.

THE CUSTOMS CONSOLIDATION ACT, 1853.

This gives the Treasury power to take lands for watch-houses, &c., and directs compensation to be assessed by a jury. Sects. 40—68 of the Lands Clauses Act, 1845, are incorporated.

THE CUSTOMS CONSOLIDATION ACT, 1876.

By this Act compensation to incapacitated persons is directed to be paid into the bank.

THE CUSTOMS BUILDINGS ACT, 1872.

This empowers the Board of Customs to purchase lands for customs purposes, and incorporates the Lands Clauses Acts, 1845, 1860, and 1869, except so far as they relate to the purchase of land otherwise than by agreement.

THE POST OFFICE LANDS ACT, 1863.

The Postmaster-General is empowered by this statute to sell or exchange lands.

THE TELEGRAPH ACT, 1863.

This provides for the execution of works by telegraph companies (whose powers have been transferred to the Postmaster-General), and provides for compensation to be assessed in accordance with the Lands Clauses Acts, 1845 and 1860.

THE POST OFFICE (LAND) ACT, 1881.

The Postmaster-General is enabled by this Act to procure an Act for the compulsory purchase of land, incorporating the Lands Clauses Acts, 1845, 1860, and 1869, except as to access to the special Act.

THE TELEGRAPH ACT, 1892.

This gives power to the Railway and Canal Commission to make a provisional order for the construction of works on private land.

THE PRISON ACT, 1865.

Power is given by this Act to purchase land for prisons. The Lands Clauses Acts, 1845 (except sects. 16, 17, 84—91, and 123) and 1869, are incorporated.

THE PRISON ACT, 1877.

This provides for the appropriation of court-houses, &c. situate within the precincts of a prison.

THE PRISON ACT, 1884.

This Act explains the power of the Secretary of State to enlarge, and to build new, prisons.

6. ACTS AS TO THE TAKING OF LAND BY LOCAL AUTHORITIES.

(i.) Generally.

THE HIGHWAY ACT, 1835.

This Act enables materials, in case of necessity, to be taken from private land, and provides for compensation therefor to be settled by justices at special sessions. Lands may be used temporarily for roads during repair. Lands may be taken for widening roads, compensation to be assessed by jury at quarter sessions.

THE SCHOOL SITES ACTS, 1841, 1849.

These Acts give power to limited owners to convey sites for schools under certain limitations.

THE TOWNS IMPROVEMENT CLAUSES ACT, 1847.

This Act gives power to acquire lands for improvements under a special Act subject to the restrictions of the Lands Clauses Act, 1845.

THE HIGHWAY ACT AMENDMENT ACT, 1864.

Power is given by this Act to purchase lands to improve highways. The Lands Clauses Acts, 1845 and 1860 (except as to purchase of land otherwise than by agreement), are incorporated.

THE ELEMENTARY EDUCATION ACT, 1870.

This Act gives compulsory powers of purchase under a provisional order confirmation Act to be procured by the Board of Education, and incorporates the Lands Clauses Acts, 1845, 1860, and 1869.

THE ELEMENTARY EDUCATION ACT, 1873.

This directs that the provisional order confirmation Act shall be deemed to be the "special" Act.

THE PUBLIC HEALTH ACT, 1875.

This repeals the previous Public Health Act, 1848. It gives local authorities power to purchase land, and incorporates the Lands Clauses Acts, 1845, 1860, and 1869, except as to access to the special Act, and except sect. 127 of the Act of 1845. In case of compulsory purchase the authority must procure the Local Government Board to introduce a provisional order confirmation Bill. In case of a petition against the purchase a local inquiry is to be held. Particular provisions as to arbitration are also contained in the Act. Claims under 20% may be referred to a court of summary jurisdiction. Claims for injuries caused by the exercise of the powers of the Act are to be settled by arbitration, or if under 20% by a court of summary jurisdiction (at the option of either party).

THE METROPOLITAN OPEN SPACES ACT, 1877.

The operation of this Act has been extended to the whole country. Its powers are exercisable by the London County Council and urban and rural district councils. It provides for the acquisition of open spaces for the benefit of the public.

THE TITHE ACT, 1878.

This Act provides for the redemption of tithe on land taken for public purposes.

THE HIGHWAYS AND LOCOMOTIVES AMENDMENT ACT, 1878.

This Act directs that minerals under disturnpiked roads shall belong to the person who would have been the owner if they had not vested in the local authority, and enacts that his right of working shall not be affected.

THE METROPOLITAN OPEN SPACES ACT, 1881.

This Act (extended as the Act of 1877) provides for compensation under the Lands Clauses Acts, 1845, 1860, and 1869, of persons having beneficial interests in open spaces, &c., acquired under the Act.

THE MUNICIPAL CORPORATIONS ACT, 1882.

This Act gives power to municipal corporations to purchase land with the consent of the Local Government Board, and incorporates the Lands Clauses Acts, 1845, 1860, and 1869, as to the purchase of lands by agreement and sales by persons under disability.

THE PUBLIC HEALTH ACT, 1875 (SUPPORT OF SEWERS),
AMENDMENT ACT, 1883.

This applies the Waterworks Clauses Act, 1847, with respect to mines, and sanitary works situated over mines, and limits the right of support therefor.

THE ALLOTMENT ACT, 1887.

This deals with the purchase of land by local authorities to provide allotments.

THE LOCAL GOVERNMENT ACT, 1888.

This Act gives power to county councils to purchase lands, and incorporates sects. 176, 177, 178 of the Public Health Act, 1875, which incorporate the Lands Clauses Acts, 1845, 1860, and 1869, except as to access to the special Act, and sect. 127 of the Act of 1845.

THE HOUSING OF THE WORKING CLASSES ACT, 1890.

This Act is divided into four parts.

Part I. deals with unhealthy areas; Part II. with unhealthy dwelling-houses; Part III. with working class lodging-houses; while Part IV. is supplemental.

Part I. provides for the making of a scheme to deal with an unhealthy area, and the confirmation of the scheme by a provisional order to be confirmed by Parliament. The Lands Clauses Acts, 1845 to 1883, are incorporated, except the sections as to purchase of land otherwise than by agreement, which are replaced by the provisions in the schedule.

In the case of premises within an unhealthy area, which are acquired under the Act, any enhanced value from their illegal use or overcrowding, &c., is to be disregarded.

When a scheme, therefore, is proposed by an authority under this part of the Act, it is important to the owner of any property affected by the scheme to make himself fully acquainted with what is proposed, because the basis of valuation under this part of the Act differs according to the class under which a property is placed. Houses which are not in themselves insanitary may be included in a scheme for dealing with an insanitary area, and where this is done these neighbouring properties should be coloured blue on the deposited plan, the insanitary houses being coloured red thereon. The owner of a house which is not insanitary, but is improperly coloured red on the plan,

should take care to be represented at the inquiry before the Government inspector and endeavour to get his premises coloured blue, so that more liberal compensation may be obtained.

Part II. provides for closing orders and demolition of houses unfit for habitation ; and gives the owner an appeal to quarter sessions. It also gives power to purchase houses which obstruct ventilation, &c. The owner may retain the site and obtain compensation for the demolition, or he may sell the site to the local authority. The compensation is to be assessed by arbitration.

The Act empowers the arbitrator to certify that the pulling down enhances the value of other houses, and to charge part of the compensation to their owners, disputes as to amounts to be settled by justices. Part only of obstructive houses may be taken if they can be severed without material detriment to the remainder.

Part III. empowers land to be acquired for constructing lodging-houses under sects. 175—178 of the Public Health Act, 1875.

Part IV. gives power to compensate tenants for the expenses of removal.

The compensation provisions of the schedule (*inter alia*) refer the assessment to arbitration ; give the arbitrator power to apportion rents, to give compensation for omitted interests, and to deal with certain other matters.

The schedule also allows an appeal to a jury by either party who is dissatisfied with the amount of compensation, if a judge of the High Court is satisfied that there has been a failure of justice. If the claimant is appellant, the costs follow the event. If the authority appeal and are successful they must pay not exceeding 20% costs, if unsuccessful the costs of the trial.

THE SMALL HOLDINGS ACT, 1892.

This gives county councils power to purchase or lease lands for small holdings ; and incorporates the Lands Clauses Acts except as to the taking of land otherwise than by agreement.

THE ISOLATION HOSPITALS ACT, 1893.

This gives power to purchase land for such hospitals, under the powers of sects. 175—178 and 296—298 of the Public Health Act, 1875.

THE LOCAL GOVERNMENT ACT, 1894.

This Act gives powers to parish councils to acquire land, and incorporates the Lands Clauses Acts, 1845 to 1883 (except as to taking lands otherwise than by agreement), and sect. 178 of the Public Health Act, 1875. By order made by the county council confirmed by the Local Government Board, or in default by the Local Government Board and confirmed by Parliament, the compulsory powers of the Lands Clauses Acts may be incorporated. Parish councils are also enabled to hire lands for allotments under order to be confirmed by the

Local Government Board, rent to be assessed by arbitration under the Arbitration Act, 1889, without any allowance for compulsory hiring.

THE DISEASES OF ANIMALS ACT, 1894.

This Act gives power to local authorities to acquire lands for wharves, stations, lairs, &c.

THE COMMONS ACT, 1899.

This Act provides that no beneficial interest over a common shall be taken away without compensation under the Lands Clauses Acts, 1845 to 1895

THE HOUSING OF THE WORKING CLASSES ACT, 1900.

This amends the principal Act as to lodging-houses, and provides that the arbitrator shall be appointed by the Local Government Board.

THE EDUCATION ACT, 1902.

This Act transfers the powers and duties of school boards to local education authorities.

THE HOUSING OF THE WORKING CLASSES ACT, 1903.

This further amends the principal Act as to schemes, and as to the service of notices.

THE DISEASES OF ANIMALS ACT, 1903.

Land may be purchased under this Act to provide facilities for dipping sheep.

(ii.) By Local Authorities in London.

MICHAEL ANGELO TAYLOR'S ACT, 1817.

This old Act, which although passed as a local Act extends over London, contains powers of taking land which have not been superseded by the Metropolis Management Act, 1855. It provides for the assessment of compensation by a jury, and directs that where the amount of the verdict does not exceed the offer, the claimant has to pay the costs of assessment, but there is no provision giving the successful claimants their costs. The authority cannot take more property for the widening of streets than they have *bonâ fide* determined to be necessary for that purpose. On the other hand, the landowner has not the specific power of requiring the authority to take the whole, as in sect. 92 of the Lands Clauses Act. The authority, however, cannot determine that a part only of a house, inseparable from the rest, is the obstructive building, or that such a "part thereof" only is necessary to be removed for the purpose of the improvement (see *post*, p. 1289).

THE METROPOLIS MANAGEMENT ACT, 1855.

This Act gives the London County Council (as successors of the Metropolitan Board of Works) and metropolitan boroughs (as successors of vestries) powers of acquiring lands. Compulsory powers are only to be exercised by the County Council for drainage purposes, and with consent of the Secretary of State. Disputed compensation is to be assessed as under the Lands Clauses Act, 1845.

THE METROPOLIS MANAGEMENT ACT, 1858.

This gives the County Council power to execute works on the shores and bed of the Thames.

THE METROPOLIS MANAGEMENT AMENDMENT ACT, 1862.

This extends the powers of the principal Act to road purposes

THE METROPOLITAN COMMONS ACT, 1866.

Under this Act beneficial rights over commons are only to be taken or injuriously affected if compensation is made under the Lands Clauses Acts, 1845 and 1860.

THE METROPOLIS MANAGEMENT (THAMES RIVER PREVENTION OF FLOODS) ACT, 1879.

This is a local Act extending the powers of the County Council to works for the prevention of floods.

THE PUBLIC HEALTH (LONDON) ACT, 1891.

This gives to local authorities in London powers as to ditches and public conveniences.

THE LONDON BUILDING ACT, 1894.

Unlike the previous Acts which it repealed, this Act was for some reason allowed to be introduced as a local Act. It provides for compensation where the County Council make certain conditions on the laying out of a new street and when the Council require buildings to be set back (compensation to be assessed summarily, or, if the amount claimed exceeds 50/., under the Lands Clauses Acts, 1845 to 1883).

THE EDUCATION ACT, 1903.

This Act applies the Act of 1902 to London, making the London County Council the education authority.

7. ACTS AS TO THE TAKING OF LANDS BY OTHER PUBLIC BODIES.

THE CHURCH BUILDING ACT, 1818.

This Act provides for the purchase of land to build churches and for the assessment by a jury of compensation in case of difference.

THE SEWERS ACT, 1833.

This Act enables land to be taken for the purposes of the Act, and provides for the assessment of compensation by a jury.

THE LAND DRAINAGE ACT, 1847.

This Act enables land to be taken for purposes of the Act, including the erection of engine-houses, and for the assessment of compensation incorporates the Lands Clauses Act, 1845.

THE LAND DRAINAGE ACT, 1861.

This provides that compensation for removal of obstructions shall be ascertained as under the Lands Clauses Acts, 1845 and 1860.

THE LLOYD'S SIGNAL STATIONS ACT, 1888.

This Act gives the Committee of Lloyd's power to acquire land for signal stations, and incorporates the Lands Clauses Acts, 1845 to 1883. In case of purchase otherwise than by agreement, a provisional order confirmation Act is required.

THE MERCHANT SHIPPING ACT, 1894.

A general lighthouse authority is enabled by this Act to purchase land for lighthouse purposes under the powers of the Lands Clauses Acts, 1845 to 1883.

8. ACT RELATING TO THE SALE OF LAND TO PRIVATE LANDOWNERS.

THE IMPROVEMENT OF LAND ACT, 1864.

This Act enables limited owners to sell land to neighbouring owners for purposes of this Act.

IV. UNDERGROUND (TUBE) RAILWAYS.

In connection with the construction of underground electric or so-called tube railways many special points arise, and the Acts relating to these undertakings contain (almost invariably) provisions for curtailing or enlarging the provisions of the Lands Clauses Acts.

Among other matters the following may be given as examples of the kind of powers which are contained in special Acts for undertakings of this class :—

(a) Power to the company to appropriate and use the subsoil and under-surface of lands without being required to take the whole of such lands or any part of the surface or any houses or buildings thereon.

(b) Power to the company to purchase vaults or cellars at a specified distance below the surface without being subject to a counter-notice under the 92nd section of the Lands Clauses Act. The company, however, in such cases, are not relieved from liability to compensate owners and others under the 68th section of the Lands Clauses Act.

(c) Power that, where in the construction and maintenance of the company's works it is necessary in order to avoid injury to buildings within so many feet of the line to underpin or otherwise strengthen the same, the company may do this work or the owners or lessees may call upon the company to do it, subject to certain provisions set out in the special Acts, the company being liable to compensate the owners, lessees, and occupiers for any resulting loss or damage.

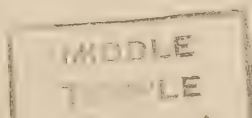
The following is an example of a provision in favour of owners and others, viz. :—

That the company shall pay to owners, &c., compensation for damage caused to property by the *working* of the railway where constructed in tunnel, notwithstanding that no part of such property is taken, but provided that the claim is made within so many years from the opening of the railway for public traffic.

Special provisions are also made as to the tribunal for settling the compensation in case of dispute.

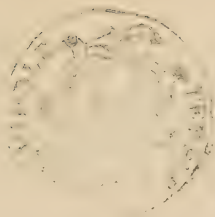
V. RAILWAY FIRES ACT, 1905.

By sect. 1 of the Railway Fires Act, 1905 (5 Edw. VII. c. 11), liability is imposed on railway companies for claims not exceeding 100*l.* for damage to agricultural land by fire arising from sparks, &c., from their engines. Sect. 2 gives railway companies powers to enter on lands to extinguish fires, and for the purpose of preventing or diminishing the risk of fire by clearing away undergrowth. Full compensation is to be made to any person injuriously affected by the exercise of these powers, including compensation for loss of amenities. The compensation is to be assessed by two justices as provided by sect. 24 of the Lands Clauses Act, 1845. The Act comes into operation on January 1, 1908.



CORRIGENDA.

- Page 18, line 27, *for* C. B., *read* Q. B.
- .. 49, Ill. (2), reversed on facts, 26 L. T. 110.
- .. 109, line 27, *for* Ch., *read* C. P.
- .. 139, „ 13, „ 26 „ 265.
- .. 148, Ill. (2), line 9, *for* Charleston, *read* Charlton.
- .. 254, last line, *read* 1 Bail C. C.
- .. 290, „ *for* 1879, *read* 1897.
- .. 336, Ill. (8), *for* 37 L. T., *read* 36 L. T.
- .. 350, delete *sub nom.* *Stainton v. Woolrych.*
- .. 356, Ill. (7), *for* 34 Ch. D., *read* 24 Ch. D.
- .. 368, „ (12), *for* 1 De G. J. & S., *read* 2 De G. J. & S.
- .. 387, „ (2), *for* [1894], *read* [1895].
- .. 417, „ (4), *for* W. N. 142, *read* W. N. 42.
- .. 453, *for* *In re Crane's Estate* (1859), *read* (1869).
- .. 462, last line but two, *for* 1 Dr. & Sm. 217, *read* 426.
- .. 552, Ill. (2), *for* 3 Rail. Cas., *read* 2 Rail. Cas.
- .. 583, line 5, *for* 533, *read* 535.
- .. 586, Ill. (1), *for* 4 Myl. & Cr., *read* 3 Myl. & Cr.
- .. 607, last line, *for* L. T. R., *read* T. L. R.
- .. 618, „ but one, *for* 85, *read* 851.
- .. 621, line 2, *for* *ib.*, *read* 24 L. J. Ch. 421.
- .. 638, Ill. (2), *for* [1891], *read* [1892].
- .. 696, „ (1), *for* 9 Eq., *read* L. R. 9 Eq.
- .. 727, *R. v. Burrow* is reported at p. 1521, *post.*
- .. 728, Ill. (3), *for* 851, *read* 831.
- .. 755, „ *for* [1903], *read* [1902].



THE LAW OF COMPENSATION.

1. The Lands Clauses Consolidation Act, 1845, and Acts affecting the same.

(A) THE LANDS CLAUSES CONSOLIDATION ACT, 1845
(8 & 9 VICT. c. 18).

An Act for consolidating in one Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a public Nature. [8th May 1845.]

[Whereas it is expedient to comprise in One General Act sundry Provisions usually introduced into Acts of Parliament relative to the Acquisition of Lands required for Undertakings or Works of a public Nature, and to the Compensation to be made for the same, and that as well for the Purpose of avoiding the Necessity of repeating such Provisions in each of the several Acts relating to such Undertakings as for ensuring greater Uniformity in the Provisions themselves: May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, that] this

Act to apply to
all Undertakings
authorized by
Acts hereafter
to be passed.

Act shall apply to every Undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the Purchase or taking of Lands for such Undertaking, and

this Act shall be incorporated with such Act; and all the Clauses and Provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the Undertaking authorized thereby, so far as the same shall

be applicable to such Undertaking, and shall, as well as the Clauses and Provisions of every other Act which shall be incorporated with such Act, form Part of such Act, and be construed, together therewith, as forming One Act.

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Preliminary.—With regard to the introductory words in this Act, it should be observed that, by sect. 8 of the Interpretation Act, 1889, “every section of an Act shall have effect as a substantive enactment without introductory words,” and that the words in brackets are repealed by the Statute Law Revision Act, 1891.

NOTE.—By the Interpretation Act, 1889, it is further provided (by sect. 23) that “In any Act passed after the commencement of this Act, unless the contrary intention appears, the expression ‘Lands Clauses Acts’ shall mean (a) as respects England and Wales, the Lands Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, the Lands Clauses Consolidation Act, 1869, and the Lands Clauses (Umpire) Act, 1883, and any Acts for the time being in force amending the same. . . .”

I. The aim, objects, and effect of the statute.

(a) These are best described by the preamble.

Illustration.

“It is to be borne in mind what the meaning of the Lands Clauses Consolidation Act was, and it cannot be more shortly described than by the preamble to that Act. . . . I do not think it is possible to express the reason why that Act was passed, and its object, better than the Legislature itself has expressed it in the preamble”: *per* Lord Blackburn in *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. at p. 440.

NOTE.—Two important Consolidating Acts were passed and became law on the same day (May 8th, 1845), viz., this Act and the Railways Clauses Act, 1845.

(b) The special Acts are not contracts between the promoters and the public if from their context they appear to be merely enabling Acts, and therefore the promoters cannot in such cases be compelled to carry out the undertaking.

Illustrations.

(1) An Act authorising the construction of a railway by a company recited that such construction would be for the benefit of the public, and that the company were willing to carry out the work, and powers of compulsory acquisition were granted to the company. Upon *mandamus* commanding the company to complete the line:—*Held*, that the *mandamus* ought not to go, no duty being cast on the company to make the line, the words of the Act being merely enabling; and that no difference was made by the fact that the company had in fact constructed part of the line: *York and North Midland Ry. v. Reg.* (1853), 1 El. & Bl. 858. “It is said that a railway Act is a contract on the part of the company to make the line, and that the public are a party to that contract, and will be aggrieved if the contract may be repudiated by the company at any time before it is acted upon. Though commonly so spoken of, railway Acts, in our opinion, are not contracts and ought not to be construed as such: they are what they profess to be, and no more: they give conditional powers, which, if acted upon, carry with them duties, but which, if not acted upon, are not, either in their nature or by express words, imperative upon the companies to whom they are granted. Courts of justice ought not to depart from the plain meaning of words used in Acts of Parliament: when they do so, they make, but do not construe, the laws; and if it had been so intended, the statute should have required the company to make the line in express terms. Indeed, some railway Acts are framed upon that principle; and to say that there is no difference between words of requirement and words of authority, when found in such Acts, is simply to affirm that the Legislature does not know the meaning of the commonest expressions”: *per* Jervis, C.J., at p. 864, *ib.*

(2) “But the company, on obtaining their Act of Parliament, were under no obligation to make the line. They failed to exercise the powers conferred upon them by the Legislature, and the period limited for making the railway has expired. It is, therefore, beyond their power to execute any part of the line; and to decree the company specifically to perform their agreement is to make that which is merely enabling and permissive, obligatory upon them, and to compel them to purchase and pay for land which would be utterly useless to them, and which they could not hold. If Sir William Drummond Stewart has suffered by the breach of the company’s agreement, he may proceed by action, and may recover damages to the extent of the injury he has sustained, but he cannot compel the performance of an agreement which is merely accessory to one which cannot be enforced”: *per* Lord Chelmsford, C., in *Scottish North-Eastern Ry. v. Stewart* (1859), 3 Macq. H. L. at p. 400.

(3) “The words ‘it shall be lawful’ are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, generally speaking it falls to the Court of Queen’s Bench to decide, on an application for a *mandamus*. And the words ‘it shall be lawful’ being, according to their natural meaning, permissive or enabling words only, it lies upon those who contend that an

obligation exists to exercise this power to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation": *per* Lord Cairns, C., in *Julius v. Bishop of Oxford* (1880), 5 App. Cas. at p. 222.

II. When the Lands Clauses Consolidation Act is deemed incorporated with the special Act.

(a) Unless the provisions of the Lands Clauses Consolidation Act are excluded, either expressly or by implication, they will be incorporated with any special Act subsequently passed (see the exact words of sect. 1); but the Act is not retrospective, and will not be deemed to be incorporated with an earlier Act unless a special Act subsequently passed incorporates it with the former Act for the purposes of the particular undertaking.

Illustrations.

(1) The London and Birmingham Railway Co. under their Act of 1833 purchased land from Eton College, and in 1846 paid the purchase-money into Court. That Act authorised the intermediate investment of such money in the funds, but was silent as to the costs of such investment. By an Act of 1846, the London and Birmingham Railway Co., with others, were consolidated and incorporated together under the style of the London and North-Western Railway Co. By this Act the existing Acts of the several companies were repealed and the companies dissolved, with a proviso that such repeal should not annul any purchase, &c., made thereunder; and by sect. 10 any money paid into the bank on account of the purchase of land by any of the dissolved companies was to be disposed of pursuant to the Act under which it had been paid in, and all the provisions of the repealed Act in relation thereto were to remain in force; by sect. 11 the Lands Clauses Act was incorporated. In 1849 Eton College petitioned for an investment of the purchase-money in the funds:—*Held*, that the London and North-Western Railway Co. were liable to pay the costs of such intermediate investment by virtue of sect. 80 of the Lands Clauses Act, 1845: *In re London and Birmingham Ry. Co.'s Act, Ex parte Eton College* (1850), 20 L. J. Ch. 1.

(2) A railway Act was passed in 1844, and certain lands were taken under its provisions. The year following the Lands Clauses Consolidation Act was passed. In 1847 another railway Act was passed extending the first and incorporating the Lands Clauses Act:—*Held*, that the Lands Clauses Act applied to the whole undertaking; became consolidated with the Acts of 1844 and 1847; and that the owner of lands taken under the first Act of 1844 became entitled to the benefit of its provisions: *Lancashire and Yorkshire Ry. v. Evans* (1851), 15 Beav. 322. "The first clause of the Lands Clauses Consolidation Act is this: 'that this Act shall apply to every *undertaking* authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of lands for such undertaking, and this Act shall be incorporated with such Act.' I read that clause as meaning this: whenever there is an 'undertaking' for which, subsequently to the passing of the Lands Clauses Consolidation Act, another Act passes which authorises the taking of other lands for that undertaking, then the Lands Clauses Consolidation Act applies to the whole undertaking, as if it had been always applicable to it, so far as any of its provisions remain applicable or there is anything to be done under it": *per* Romilly, M.R., at pp. 326—7, *ib.*

(3) In 1846 the London and Birmingham Railway Co. took lands under the powers conferred by an Act of 1833:—*Held*, that the owner's rights as to costs were regulated by that Act, not by the Lands Clauses Act, 1845: *In re Holden's Estate* (1855), 1 Jur. (N.S.) 995.

(4) A public improvements Act, passed after the Lands Clauses Act, enacted that all and singular the enactments of a former public improvements Act, passed before the Lands Clauses Act, should extend to the new improvements as if they had been authorised by the former Act:—*Held*, that the incorporation of the Lands Clauses Act was excluded, so that a landowner could not claim under it the costs of payment out of Court under the disability clauses of the Lands Clauses Act: *In re Cherry's Settled Estates* (1862), 4 De G. F. & J. 332. “I must confess to feeling regret at being obliged to come to a different conclusion from the Vice-Chancellor, who has decided the question of costs on the ground of the Lands Clauses Act forming part of 9 & 10 Vict. c. 34. . . . I should be glad to hold that those who [in this case] are subject to the provisions of the 9 & 10 Vict. c. 34 are entitled to the benefit of that provision; but I am bound to see whether the Act of the 9 & 10 Vict. c. 34 contains clauses which are applicable to that provision. The Lands Clauses Act is not retrospective. When the 9 & 10 Vict. c. 34 was passed, there was another Act in operation, namely, the 3 & 4 Vict. c. 87, and the undertaking authorised by the 9 & 10 Vict. is only an extension of that provided for by the 3 & 4 Vict. c. 87. The one Act is only supplemental to the other. If that was the general view of the Legislature and the object of its enactments, the operation of those enactments was this: to pass over the intermediate Act, the Lands Clauses Act, and to carry back the directions of the 9 & 10 Vict. c. 34 to those of the 3 & 4 Vict. c. 87, so as not to be subject to the machinery of the intermediate Act”: *per* Lord Westbury, C., at p. 335, *ib*. Followed in *In re St. Dunstan's Charity Schools* (1871), L. R. 12 Eq. 537; disapproved in *In re Wood's Estate*, *post*, and approved in *In re Mills' Estate*, *Ex parte Commissioners of Works*, *post*.

(5) A railway company, long before incorporated, and authorised by earlier Acts to raise large sums of capital, obtained, in 1859, an Act providing for the construction of new works and the raising of 100,000*l*. additional capital, and enacting (*inter alia*) that the Lands Clauses Act should be incorporated in the special Act, “save so far as the clauses and provisions thereof respectively were expressly varied or excepted by this Act”:—*Held*, that sect. 16 of the Lands Clauses Act, which requires the whole capital to be subscribed before the compulsory powers of taking land is put into operation, was inapplicable to the new Act: *Weld v. London and South-Western Ry.* (1863), 32 Beav. 340.

(6) By an Act of 1855 the Public Works Commissioners were incorporated and empowered to acquire lands for the purpose of erecting public offices. Sect. 9 provided for the inclusion of (*inter alia*) sect. 49 of an earlier Act (3 & 4 Vict. c. 87) in the later Act. Sect. 49 of the earlier Act provided that when purchase-money was required to be paid into the bank in the name of the Accountant-General, and to be reinvested in land, the Court might, if it thought fit, order the expenses of the purchases to be paid by the Commissioners:—*Held*, that the effect of these enactments was to introduce the incorporated sections of the earlier Act into the later Act, just as if they had been written into it for the first time, and that therefore the later Act, with those sections, must be deemed to have been enacted after the Lands Clauses Act:—*Held*, therefore, that under sect. 1 of the Lands Clauses Act, sect. 80 of that Act was incorporated with the Act of 1855, and that the Court had jurisdiction to deal with the costs of payment out to the persons absolutely entitled to the purchase-money of lands taken under the statutory powers: *In re Wood's Estate* (1886), 31 Ch. D. 607.

(7) By an Act 3 & 4 Vict. c. 87 the Commissioners of Woods and Forests were empowered to make additional thoroughfares in the Metropolis, and for that purpose to take and purchase houses, and further powers were conferred upon them in 1846. Neither of these Acts contained any provision for payment by the Commissioners of the costs of applications for payment of purchase-money out of Court with respect to property taken upon a petition for payment out:—*Held*, following *In re Cherry's Settled Estates*, *ante*, that the later Act was incorporated with the earlier, and therefore that the Lands Clauses Act could not be treated as incorporated with the special Acts so as to make the Commissioners liable to pay the costs of the petition: *In re Mills' Estate*, *Ex parte Commissioners of*

Works (1886), 34 Ch. D. 24. "I should hardly mention more than that decision except that in *In re Wood's Estate*, *ante*, the present Master of the Rolls, sitting in the other branch of this Court, though he was deciding a question arising on a different Act (18 & 19 Vict. c. 95) which gave powers to these Commissioners, expressed an opinion that that decision was erroneous, and one that he did not follow, and that in future it ought to be set aside and disregarded. Of course, that was only an *obiter dictum*. It was not a matter which had to be decided in the case before him, but I do not agree with the view he took. I think it would be wrong for us to disregard the decision in *In re Cherry's Settled Estates*, *ante*, and I must express my opinion that I think it was rightly decided, because 9 & 10 Vict. c. 34, although it was subsequent to the Lands Clauses Consolidation Act, threw the Commissioners, in taking any land after that, back to the 3 & 4 Vict. c. 87, which clearly could not and did not incorporate the Lands Clauses Act": *per* Cotton, L.J., at p. 30, *ib.*

(b) If the special Act does not authorise a public undertaking, but is of the nature of a private estate Act for a private purpose, the Lands Clauses Act will not be deemed incorporated with it.

Illustrations.

(1) A company incorporated under a private Act for the erection of a hotel having obstructed certain ancient lights of the plaintiff, the latter gave them notice, under sect. 68 of the Lands Clauses Act, requiring them to summon a jury to assess the amount of compensation due to him for the injury to his property, and upon their failing to do so, sued them for a penalty :—*Held*, that the action was not maintainable, the Lands Clauses Act not being incorporated either expressly or by implication into the private Act: *Wale v. Westminster Palace Hotel* (1860), 8 C. B. N. S. 276. "We are of opinion that the Westminster Palace Hotel Company's Act does not incorporate any of the provisions of the Lands Clauses Consolidation Act. By its express provisions the company's Act is not a public Act. Its object is merely to give the lease granted by the Westminster Improvement Commissioners to the company a priority over certain charges and incumbrances to which it might otherwise have been postponed; and the preamble recites that its doing so will enure greatly to the benefit of the creditors of the Commissioners. It appears to us in all its provisions to be rather in the nature of a private estate Bill than of an Act intended to incorporate the provisions of a statute applicable only to the acquisition of lands for undertakings of a (private, *sic*) public nature": *per* Erle, J., at p. 288, *ib.*

(2) The President and Fellows of Sion College were authorised by Act of Parliament to sell the site of their college and to take the purchase-money and apply it in building elsewhere. They sought to acquire a site belonging to the Corporation of London, and desired to purchase two plots, as to one of which there was a doubt whether a good title could be made. "The Sion College Act of 1884 was then passed. But that was not like an Act to authorise any undertaking at all. In my opinion it was certainly not a public undertaking, because it was really an Act to enable the Corporation to sell and Sion College to buy this piece of land, and it was necessary for that purpose that there should be an Act of Parliament to enable these vendors to make a good title. Now, for what purposes is the Lands Clauses Consolidation Act incorporated? The first section of that Act, after reciting that 'it is expedient to comprise in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for undertakings or works of a public nature,' enacts that 'this Act shall apply to every undertaking authorised by any Act which shall hereafter be passed, and which shall authorise the purchase or taking of land for such undertaking.' Undoubtedly there the words 'of a public nature or undertakings of a public nature' are not introduced, but I am of opinion that the true construction of the Act is that it was only intended to incorporate it into

special Acts passed in order to permit companies or corporations to undertake works of a public character, to carry out undertakings of a public character. . . . Upon no construction of the Sion College Act of 1884 can we say that sect. 80 of the Lands Clauses Consolidation Act is introduced, or the powers contained in that section given to the Court as regards Sion College and the persons from whom they purchased their land": *per* Cotton, L.J., in *Ex parte London Corporation, In re Sion College* (1887), 57 L. T. at p. 744.

III. How the incorporation of the Lands Clauses Act with the special Act may be prevented.

(a) The incorporation of the Lands Clauses Act or any part of it may be excluded in express terms by the special Act, as provided by the words of sect. 1. See Illustration *R. v. London Corporation* (1867), L. R. 2 Q. B. 292, *infra*.

(b) Those provisions of the Lands Clauses Act which are expressly excluded or varied by the special Act will not apply; but all the other provisions will be incorporated.

Illustrations.

(1) A railway company was incorporated by an Act which provided, *inter alia*, that the provisions of the Lands Clauses Act should, "so far as the same are applicable and are not inconsistent with the provisions hereinafter contained," be incorporated with and form part of the special Act. It was also enacted that such parts of the company's line as passed through a specified piece of land should be arched over, so as to afford to the owner a communication between the severed portions :—*Held*, that this provision was not inconsistent with, and therefore did not exclude, the operation of sect. 92 of the Lands Clauses Act : *Sparrow v. Oxford, Worcester, and Wolverhampton Ry.* (1852), 2 De G. M. & G. 94.

(2) A public improvements Act referred back to and incorporated an earlier public improvements Act, which, in its turn, referred back to and incorporated a third. Each of them was after the Lands Clauses Act in date, and in none of them was there any provision for payment of costs by promoters except in the case of moneys paid into Court in the cases of persons under disability :—*Held*, that the provisions of sect. 80 of the Lands Clauses Act as to the payment of the costs of sales and conveyances must be deemed to be incorporated by and in the later Acts, there being nothing in them to except or vary such provision : *In re Westminster Estate, In re Vicar of St. Sepulchre, Westminster* (1864), 4 De G. J. & S. 232.

(3) "The Lands Clauses Consolidation Act was passed to make a general code regulating the manner in which lands might be taken under the authority of Parliament, and compensation made for injury occasioned by what was thus legalised by the Legislature; and we think that, in construing any Acts of Parliament passed since that Act, we ought to suppose that the Legislature intended to follow this code, except where, by the express language of the special Act, or by necessary intendment from its provisions, it appears that the intention of the Legislature was in some particular to depart from that general

code, and substitute something else": *per* Blackburn, J., in *R. v. London Corporation* (1867), L. R. 2 Q. B. at p. 295.

(4) By sect. 2 of the Metropolitan District Railway Act, 1875, the Lands Clauses and Railways Clauses Acts were, except where expressly varied by the special Act, incorporated with that Act. The Lands Clauses Act contains full provisions as to the procedure in arbitrations, and as to recovering compensation with costs. The special Act provided that arbitrations conducted under its provisions should be held before an arbitrator appointed by the Board of Trade, but contained no specific provision with regard to costs. An arbitration was held under the Act, and the arbitrator awarded compensation, but said nothing as to costs:—*Held*, that the claimant was entitled to costs in accordance with the Lands Clauses Act, for the variation in the special Act as to the nature of the tribunal had not the effect of repealing the provisions in the Lands Clauses Act as to costs: *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. 425. "According to the argument of the appellants, if the company had chosen to take and purchase compulsorily all the houses abutting upon the portions of those roads which might be lowered, they would have done so without any obligation to pay one shilling of costs to any one of the owners of the property taken. Of course, there can be no question that if the Legislature had not provided for costs in such a case, a Court of justice could not do so; but in construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind and ought to have much weight and force": *per* Lord Selborne, C., at p. 433, *ib.* "In a Bill of this kind, I do not think I exaggerate in saying that nearly three-fourths of the clauses were of such a character that they might be made applicable to whole ranges and classes of public enactments for beneficial purposes, undertaken by public companies or bodies, such as gas Bills, dock Bills, railway Bills or other Bills of the same character. Afterwards general Acts were passed containing these common clauses, and since that time special Acts have simply incorporated the general Acts. But such a course could not have been pursued all this time if a narrow construction were to be put upon the different clauses by which the general Acts are dovetailed into what I may call the principal Bill, that is to say, the Bill in agitation at the moment, and you were obliged to spell out every syllable and word of the general Act in order to see how far it would or would not tally or agree with the substance of the principal Act as regards the work which the principal Act was passed to effect": *per* Lord Hatherley at pp. 435—6, *ib.*

(5) "What is there in point of language to exclude from the provisions of this Elementary Education Act the whole or any part of the Lands Clauses Consolidation Act, except that relating to the access to the special Act? If that section [20 (1) of the Elementary Education Act] is read as we are asked to read it, as incorporating only the clauses relating to compulsory purchase, the whole machinery comes to a deadlock, and it is not consistent with the language. It is, 'With respect to the purchase of land by school boards, the Lands Clauses Consolidation Act, 1845, shall be incorporated with this Act,' and there is sense in that. As was pointed out in argument, if that is not so, the school board cannot get land from tenants for life (perhaps it could under the Settled Land Act, but it certainly could not when this Act was passed), nor can it get land from persons under disability, and so on": *per* Lindley, L.J., in *Kirby v. Harrogate School Board*, [1896] 1 Ch. at p. 447.

(c) If a local authority, acting under the Public Health Act, 1875, takes lands, the arbitration and the right to costs are regulated by the Lands Clauses Act, and not by the Public Health Act.

Illustration.

The Lands Clauses Acts are incorporated with the Public Health Act, 1875, by sect. 176 of that Act, and a local authority can, therefore, acquire land and property compulsorily. The Public Health Act also contains provisions as to arbitrations, and directs that, in arbitrations held under that Act, the costs shall be in the discretion of the arbitrator :—*Held*, that these provisions in the Public Health Act refer to matters other than the compulsory taking of land, and that R., the applicant in the case, was therefore entitled to have his costs awarded him as provided by the Lands Clauses Acts : *Ex parte Rayner* (1878), 3 Q. B. D. 446.

(d) When the whole of the Lands Clauses Act is incorporated in a special Act, sect. 68 of the former Act is itself enough to give the right to compensation for land injuriously affected.

Illustration.

By the Chelsea Improvement Act, 1845, s. 83, “so much of the Lands Clauses Act as is applicable and is not modified by or inconsistent with the provisions of this Act, shall apply to the improvements authorised by this Act to be made, and shall be read as forming part of this Act.” Sect. 104 authorised the Commissioners under the Act to alter the level of any street, but enacted nothing as to compensation. Sects. 124 and 127 authorised the removal of projections from houses, the setting back of the line of the street, &c. By raising the level of a footpath near F.’s premises, the access to his shop was obstructed, and his premises “injuriously affected” :—*Held*, that F. was entitled to compensation under sect. 68 of the Lands Clauses Act, and that the fact of compensation being expressly given in cases under sects. 124 and 127 of the special Act was not inconsistent with the intention that it should be given in cases under sect. 104, by virtue of the provisions of sect. 68 of the Lands Clauses Act : *R. v. St. Luke’s, Chelsea* (1872), L. R. 7 Q. B. 148.

NOTE.—As to incorporation and exclusion of groups of sections by use of introductory headings, see sect. 5, *post*.

IV. Cases where a provisional order is required.*Illustration.*

If the applicability of the compulsory clauses depends upon the making of a provisional order and the sanction of the order by Parliament, the provisional order cannot be brought up by *certiorari* to be quashed. The proper course is to petition Parliament against the passing of the confirmatory statute : *Frewen v. Hastings Local Board* (1865), 13 W. R. 678.

V. Amendment of the Lands Clauses Act.

The Lands Clauses Act is amended by—

The Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106).

The Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18).

The Lands Clauses (Umpire) Act, 1883 (46 & 47 Vict. c. 15).

The Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11).

These Acts, as well as other public Acts, may be further amended or modified by the special Act, and the variation may be express or by implication, or the terms of the Lands Clauses Acts may be excluded by inconsistent provisions in the special Act.

Illustration.

A railway company under a special Act passed in 1887 had power to execute certain works, a station being a necessary part. The company erected a station within the limits of deviation, but beyond the general line of buildings:—*Held*, that the effect of the special Act was to repeal sect. 75 of the Metropolis Management Amendment Act, 1862: *City and South London Ry. v. London County Council*, [1891] 2 Q. B. 513: following *London and Blackwall Ry. v. Limehouse District Board of Works* (1856), 26 L. J. Ch. 164; and followed by *London County Council v. London School Board*, [1892] 2 Q. B. 606.

Interpretations in this Act.

And with respect to the Construction of this Act and of Acts to be incorporated therewith, be it enacted as follows:

2. The Expression “the Special Act,” used in this Act, shall be construed to mean any Act which shall be hereafter passed which shall authorize the taking of Lands for the Undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid; and the Word “prescribed,” used in this Act in reference to any Matter herein stated, shall be construed to refer to such Matter as the same shall be prescribed or provided for in the Special Act, and the Sentence in which such Word shall occur shall be construed as if instead of the Word “prescribed,” the Expression “prescribed for that Purpose in the Special Act” had been used; and the Expression “the Works” or “the Undertaking” shall mean the Works or Undertaking, of whatever nature, which shall by the Special Act be authorized to be executed; and the Expression “the Promoters of the Undertaking” shall mean the Parties, whether Company, Undertakers, Commissioners, Trustees, Corporations, or Private Persons, by the Special Act empowered to execute such Works or Undertaking.

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The meaning of "any Act . . . which shall authorise the taking of lands."

(a) A company, *e.g.*, a railway company, in the absence of power for that purpose given in express terms by their special Act cannot compulsorily acquire land vested in and actually used by another railway company for the purposes of their undertaking.

Illustrations.

(1) The plaintiff company, acting under statutory powers, acquired a certain plot of land and made their railway over it. The defendant company afterwards gave notice to the plaintiff company that, acting under their statutory powers, they required to purchase and take the same piece of land. Upon motion for an injunction to restrain the defendant company from taking any further step to acquire the land, the injunction was granted until the legal effect of such conflicting powers had been tried: *Manchester, Sheffield and Lincolnshire Ry. v. Great Northern Ry.* (1851), 9 Hare, 284.

(2) A railway company had power "to make and maintain the railway and works on the line and upon the lands delineated in the Parliamentary plan and described in the books of reference, and to enter upon, take and use the said lands or such of them as should be *necessary* for that purpose"; but they were not to enter upon, take or use any of the land or property of a certain pre-existing railway company or in any manner to alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorised in manner in the said Act authorised, and not otherwise. One of the clauses of the Act conferred certain powers upon the company for effecting a junction with the pre-existing railway:—*Held*, that there being nothing to show that it was absolutely necessary for the company, in order to effect the junction, to take, as owners, certain lands over which the line of the pre-existing railway actually passed, they had no such power; but there was a right to enter upon such lands, by way of easement, for the purpose of effecting the junction: *Oxford, Worcester and Wolverhampton Ry. v. South Staffordshire Ry.* (1852), 1 Drew. 255.

(3) It is not competent to a later railway company, in the absence of power for that purpose given in express terms by their special Act, to acquire compulsorily the soil and freehold in lands already vested in and actually used by another railway company for the purposes of their undertaking, although the land lies within the limits of deviation shown by the Parliamentary plans of the later company and their special Act confers upon them the usual general power to enter upon and take such of the lands delineated upon the plans as may be required for the purposes of their railway: *Dublin and Drogheda Ry. v. Navan and Kingscourt Ry.* (1871), Ir. R. 5 Eq. 393.

(b) A company cannot take land that is not actually wanted for the formation of their undertaking which has been (even after the special Act) acquired by other promoters under their special Act for the purpose of their undertaking.

Illustration.

The plaintiffs were empowered by their Act to take certain lands compulsorily, and also to take certain other lands with consent. The defendants had power to acquire, by

compulsory process, certain lands scheduled in their Act, among which were certain pieces of land, which the plaintiffs had purchased, with the consent of the owners, after the date of the defendants' Act. The defendants gave notice of their intention to take, under their statutory powers, a greater quantity of the land purchased by the plaintiffs than was necessary for their line, stations, &c., whereupon the plaintiffs filed a bill and applied for an injunction to restrain the defendants from taking more of their land than was necessary for their line :—*Held*, that the plaintiffs, having occupied the ground before the defendants, were entitled to hold so much of it as was not actually wanted for the formation of the defendants' railway. Injunction granted, with liberty to plaintiffs to bring action to try the legal right : *Lancaster and Carlisle Ry. v. Maryport and Carlisle Ry.* (1846), 4 Rail. Cas. 504.

(c) Where two separate companies are authorised to take the same land and both serve notice to treat but do no more until after the powers of the company whose Act was first passed have expired, the other company will not be restrained from entering on the land and commencing works thereon.

Illustration.

The plaintiffs were empowered by an Act, passed in July, 1870, to take certain of W.'s land. The power of compulsory purchase, was to expire in two years. By an Act, passed in 1871, the defendants were empowered to take the same land. This Act contained a clause protecting the interest of the plaintiffs. The plaintiffs gave W. notice to treat on August 1st, 1871, and the defendants gave notice on December 19th, 1872, and on November 19th, 1873, sent W.'s agent a cheque for 100*l.* (which was not accepted as the price of the land, but merely placed on deposit), entered upon the land, and began to execute works there :—*Held*, that the Court did not grant interlocutory injunctions where there were questions to be decided as to the legal exercise of the right at the time ; that the plaintiffs had no right of possession unless there was some agreement or unless the steps directed by the Lands Clauses Act had been taken ; and that the defendants had the *primâ facie* right : *Bristol and North Somerset Ry. v. Somerset and Dorset Ry.* (1874), 22 W. R. 601.

Interpretations
in this and the
Special Act.

3. The following Words and Expressions, both in this and the Special Act, shall have the several Meanings hereby assigned to them, unless there be something either in the Subject or Context repugnant to such construction ; (that is to say,)

Number. Words importing the Singular Number only shall include the Plural Number, and Words importing the Plural Number only shall include the Singular Number :

Gender. Words importing the Masculine Gender only shall include Females :

Lands." The Word "Lands" shall extend to Messuages, Lands, Tenements, and Hereditaments of any Tenure :

“Lease.” The Word “Lease” shall include an Agreement for a Lease :

“Month.” The Word “Month” shall mean Calendar Month :

“Superior Courts.” The Expression “Superior Courts” shall mean Her Majesty’s Superior Courts of Record at Westminster or Dublin, as the Case may require :

Oath.” The Word “Oath” shall include Affirmation in the Case of Quakers, or other Declaration lawfully substituted for an Oath in the Case of any other Persons exempted by Law from the Necessity of taking an Oath :

“County.” The Word “County” shall include any Riding or other like Division of a County, and shall also include County of a City or County of a Town :

“The Sheriff.” The Word “Sheriff” shall include Under Sheriff, or other legally competent Deputy, and where any Matter in relation to any Lands is required to be done by any Sheriff, or by any Clerk of the Peace, the

“The Clerk of the Peace.” Expression “the Sheriff,” or the Expression “the Clerk of the Peace” shall in such Case be construed to mean the Sheriff or the Clerk of the Peace of the County, City, Borough, Liberty, Cinque Port, or Place where such Lands shall be situate ; and if the Lands in question, being the Property of one and the same Party, be situate not wholly in one County, City, Borough, Liberty, Cinque Port, or Place, the same Expression shall be construed to mean the Sheriff or Clerk of the Peace of any County, City, Borough, Liberty, Cinque Port, or Place where any Part of such Lands shall be situate :

“Justices.” The Word “Justices” shall mean Justices of the Peace acting for the County, City, Liberty, Cinque Port, or Place where the Matter requiring the Cognizance of any such Justice shall arise, and who shall not be interested in the Matter ; and where such Matter shall arise in respect of Lands, being the Property of one and the same Party, situate not wholly in any one County, City, Borough,

Liberty, Cinque Port, or Place the same shall mean a Justice acting for the County, City, Borough, Liberty, Cinque Port, or Place where any Part of such Lands shall be situate, and who shall not be interested in such Matter ; and where any Matter shall be authorized or required to be done by Two Justices, the

“ Two Justices.” Expression “ Two Justices ” shall be understood to mean Two Justices assembled and acting together :

“ Owner.” Where under the Provisions of this or the Special Act, or any Act incorporated therewith, any Notice shall be required to be given to the Owner of any Lands, or where any Act shall be authorized or required to be done with the Consent of any such Owner, the Word “ Owner ” shall be understood to mean any Person or Corporation who, under the Provisions of this or the Special Act, would be enabled to sell and convey Lands to the Promoters of the Undertaking :

“ The Bank.” The Expression “ the Bank ” shall mean the Bank of England where the same shall relate to Monies to be paid or deposited in respect of Lands situate in England, and shall mean the Bank of Ireland where the same shall relate to Monies to be paid or deposited in respect of Lands situate in Ireland.

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I. The word “ Lands ” extends to (a) Messuages ; (b) Lands ; (c) Tenements ; (d) Hereditaments ; (e) Annuities charged on land.

(a) Messuages.

Illustrations.

(1) The word "messuage" is synonymous with "house" (Co. Litt. 56 ; *per* Buller, J., in *Scholes v. Hargreaves* (1792), 5 T. R. 46 ; 2 R. R. 532) ; or at least is as comprehensive.

(2) "The distinction suggested in the early cases between *messuage* and *house* in regard to the greater comprehensiveness of the former is not to be relied on, and it is clear that even the word 'messuage' would not now be held to carry land beyond a homestead or orchard, though contiguous to or enjoyed with it" : 1 Jarman on Wills, 779.

(3) Where, however, the word "house" would carry land or buildings beyond its own ambit, a like result would follow if the word "messuage" were employed : 1 Jarman, 778, 779 ; *Hibon v. Hibon* (1863), 32 L. J. Ch. 374. See, further, Stroud's "Judicial Dictionary," tit. "Messuage."

(b) Lands.

In the contemporary consolidation statutes for Scotland, the definition of "lands" is "houses, lands, tenements and heritages of any description or tenure" : 8 & 9 Vict. cc. 17, 19.

For the purposes of the Conveyancing and Law of Property Act, 1881, s. 2 (ii.), "land," unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings ; also an undivided share in land.

For the purposes of the Settled Land Act, 1882, s. 2, sub-s. 10 (i.), "land" includes incorporeal hereditaments, also an undivided share in land.

By the Interpretation Act, 1889, s. 3, "land" includes "messuages, tenements, and hereditaments, houses and buildings of any tenure, unless where there are words to exclude houses and buildings, or to narrow the meaning to tenements of some particular tenure."

(c) Tenements and Hereditaments of any tenure.

"The word 'hereditament' is of as large extent as any word, for whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixt, is an hereditament" : Shep. Touch. 91 ; Co. Litt. 6 a.

"*Hereditament* is defined in the text books of authority to signify all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him who is next of blood, and not to executors or administrators as chattels do" : *per* Wilde, C.J., in *Lloyd v. Jones* (1848), 17 L. J. C. P. 206 ; 6 C. B. 81.

"The most comprehensive words of description applicable to real estate are *tenements* and *hereditaments*, as they include every species of realty, as well corporeal as incorporeal" : 1 Jarman on Wills, 777 ;

e.g., an advowson: *Westfaling v. Westfaling* (1755), 3 Atk. 460; *Crompton v. Jarratt* (1885), 30 Ch. D. 298.

Market tolls are not rateable under a power to rate "land, house, shop, warehouse or other building, tenement or hereditament": *Colebrooke v. Tickell* (1836), 4 A. & E. 916; 43 R. R. 520; but where a similar collocation was followed by "meadow and pasture ground excepted," it was held that a gas company was rateable as occupiers of the land in which its pipes lay: *R. v. Shrewsbury Gas Co.* (1831), 3 B. & Ad. 216; 37 R. R. 409.

The word, however, may include leaseholds. Thus, in sect. 56 of the County Courts Act, 1888, restricting the jurisdiction of the County Court, "hereditament" is used "not to describe the quantum of interest, but the thing itself, which is the subject-matter of the interest" (*per* Bowen, L.J.); and leaseholds are within the restriction: *Tomkins v. Jones* (1889), 22 Q. B. D. 599.

The term is in many cases limited so as not to include strata of land unless special power is conferred with regard thereto upon the promoters: *Hill v. Midland Ry.* (1882), 21 Ch. D. 143.

(d) It seems that the words "hereditaments of any tenure" include incorporeal as well as corporeal hereditaments, and that the words "of any tenure" should be read as meaning "of whatever tenure, if any."

Illustrations.

(1) A railway company, being under the necessity of widening their line, proposed to do this where it crossed the plaintiffs' property, not by acquiring lands or houses, &c., but by carrying the line upon an arch wider than the former one. Notice was accordingly given to the plaintiffs of their intention to take this course, and stating the company's desire to purchase the right of way:—*Held*, that such a notice, to take an easement, is not a notice warranted by the Lands Clauses Act, the term "hereditament" in the Lands Clauses Act meaning a corporeal hereditament, a hereditament which may be the subject of tenure, which a right of way cannot be: *per* Lord Cranworth in *Pinchin v. London and Blackwall Ry.* (1854), 5 De G. M. & G. 851, 861.

NOTE.—(See, however, Illustration No. 3 below.)

(2) "I think there can be no doubt that a ferry, being a franchise, is an 'hereditament.' Lord Coke says: 'An hereditament is by much the largest and most comprehensive expression, for it includes not only lands and tenements, but whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed'; and Blackstone, in the chapter on incorporeal hereditaments, amongst the various descriptions which he enumerates, mentions 'franchises.' That a 'ferry' is a 'franchise' there can be no possible doubt; and therefore a ferry would come within the term 'lands' as used in the statute": *Reg. v. Cambrian Ry.* (1871), L. R. 6 Q. B., *per* Cockburn, C.J., at p. 427. The actual decision in this case was overruled in *Hopkins v. Great Northern Ry.* (1877), 2 Q. B. D. 224, but the opinion expressed that a ferry as a franchise would come within sect. 3 of the Lands Clauses Act was not dissented from, and was approved in *Great Western Ry. v. Swindon and Cheltenham Ry.*, *infra*.

(3) "I confess my inability to understand why the expression 'hereditaments' in sect. 3 should not be held to include incorporeal hereditaments. I think it does, and it was so held by the Court of Queen's Bench in *Reg. v. Cambrian Ry. (supra)*, Lord Blackburn observing that 'hereditaments,' as used in the Act, included 'anything which is the subject of inheritance.' That case was overruled by the Court of Appeal in *Hopkins v. Great Northern Ry. (supra)*, on the ground that the injury to the ferry, for which the Court of Queen's Bench had held the company liable in compensation, was attributable to the user, not to the construction of the railway. But Mellish, L.J., who delivered the judgment of the Court of Appeal, said: 'In the case of *Reg. v. Cambrian Ry.* the judges rely on the clause in the Lands Clauses Consolidation Act, by which the word "land" includes "franchises." This no doubt proves that if franchises are injured by the construction of the railway or works, which they may be, compensation may be obtained.' So that the Court of Appeal in *Hopkins v. Great Northern Ry.* did not differ from, but on the contrary approved of, the decision in *Reg. v. Cambrian Ry.* in so far as it affirmed that an incorporeal hereditament, such as a franchise of ferry, is 'land' within the meaning of sect. 3, and therefore 'land' within the meaning of sect. 68 of the Lands Clauses Act. . . . The observations made by Lord Cranworth in that case [*Pinchin v. London and Blackwall Ry. (supra)*] are entitled to the greatest respect; but I agree with Cotton, L.J., in thinking that these observations were directed to the question whether the word 'lands' in sect. 18 of the Lands Clauses Act, apart from any peculiar powers conferred by the special Act, includes an easement. What the noble and learned lord, as I understand him, did say, was that the context of the general Act forbade the application of sect. 18 to 'lands' which were not corporeal hereditaments, a proposition which I do not think it necessary to dispute. . . . The words 'of any tenure' were not, in my opinion, intended to restrict the scope of the enumeration which precedes them. I agree with my noble and learned friend (Lord Bramwell) that they ought to be read in the same sense as if the expression in the Act had been 'of whatever tenure, if any.' These words do not seem to have been regarded as of any consequence, at least they were not made matter of argument or judicial comment in the cases to which I have referred": *per* Lord Watson in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. at pp. 802, 803.

(e) An annuity charged on land is a hereditament.

Illustration.

Lands which were subject to a rent-charge in favour of a lunatic during his life were taken by a corporation under the Lands Clauses Act. The Court held that the annuity was a hereditament, and so within the clause as to the purchase of "lands"; and therefore that there was no jurisdiction to make an order authorising the committee of the lunatic to release the lands from the rent-charge upon the corporation purchasing in the name of the lunatic a Government annuity of the same yearly amount for his life: *In re Brewer* (1875), 1 Ch. D. 409.

II. Easements.

See sect. 18, *post*.

III. Mines and minerals.

See Railways Clauses Act, *post*.

IV. Superior Courts.

This term now signifies the Supreme Court of Judicature in England, including His Majesty's High Court of Justice and His Majesty's Court

of Appeal, and the Supreme Court of Judicature in Ireland, including His Majesty's High Court of Justice in Ireland and His Majesty's Court of Appeal in Ireland: 36 & 37 Vict. c. 66, ss. 3, 4; and 40 & 41 Vict. c. 57, ss. 4, 5.

V. Oath.

This now includes "affirmation," for anyone may affirm who objects to be sworn and states as the ground of his objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief: 51 & 52 Vict. c. 46, s. 1.

VI. Sheriff and clerk of the peace.

In the provisions of the Lands Clauses Acts as to the reference to a jury, where the term "sheriff" is used, the provisions apply also to every coroner or other person lawfully acting in his place: Lands Clauses Act, s. 40, *post*.

Within the city and liberty of Westminster, the high bailiff of that city and liberty are to be deemed to be substituted for the sheriff in the same provisions: Lands Clauses Amendment Act, 1869, s. 3.

As to disqualification of sheriff, *see* heading "Justices," under sect. 24, *post*.

VII. "Place where any part of such lands shall be situate."

Illustration.

The land injuriously affected by certain railway works was within the city of Lincoln; the works were in the county of Lincoln. The mode in which the works injuriously affected the land was that they obstructed the access to a ferry over the river and appurtenant to the land in question:—*Held*, that a jury of the city of Lincoln was competent to try the question of compensation: *R. v. Great Northern Ry.* (1849), 14 C. B. 25.

VIII. "Justices" and "two justices."

See sect. 24, *post*, and propositions and illustrations thereunder.

IX. Owner.

Illustrations.

(1) The cleansing and repairing of drains and sewers is *prima facie* the duty of him who occupies the premises, and does not devolve upon the owner, merely as such. Hence, a declaration for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on general demurrer if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege

some ground of liability. The words "owner and proprietor" do not of necessity import that the party is occupier : *Russell v. Shenton* (1842), 3 Q. B. 449.

(2) "The term 'owner,' as well as 'proprietor,' is ambiguous. It may mean that the defendant had the whole legal interest in the house, so that no one else had an estate in possession or reversion, or that he had the subsisting legal interest at the time of the wrong complained of, or that he was the owner of the whole or some interest, as distinguished from that of the tenant in possession": *per* Parke, B., in *Chauntler v. Robinson* (1849), 4 Ex. at p. 170.

(3) By sect. 3 of the Artizans' and Labourers' Dwellings Act, 1868, the expression "owner," in addition to the definition given by the Lands Clauses Act, included all lessees or mortgagees of any premises required to be dealt with under the Act, except persons holding or entitled to the rents and profits of such premises for a term of years, of which twenty-one years did not remain unexpired.

H. was, in July, 1886, entitled as assignee to the residue of a long lease expiring at Michaelmas, 1886, and was also the assignee of a new lease for twenty-one years to commence at Michaelmas, 1886, granted by B., the owner. The property being found to be in a bad state, the local authority caused copies of the medical officer's reports, and notice of the time and place fixed for their consideration, to be sent to H. as the "owner." In October, 1886, the local authority made an order for the demolition of the buildings:—*Held*, that although the interest of the tenant (H.) in the new lease was in law only an *interesse termini*, he had such an interest in the premises at the time when the notices were served upon him as to make him the "owner" within the meaning of the Act : *R. v. St. Marylebone Vestry* (1887), 20 Q. B. D. 415.

NOTE.—As to persons entitled to sell under the Act, *see* sect. 7, *post*.

Short Title of
the Act.

4. [*And be it enacted, That*] in citing this Act in other Acts of Parliament, and in legal Instruments, it shall be sufficient to use the Expression "The Lands Clauses Consolidation Act, 1845."

NOTE.—Words in italics repealed : S. L. R. 1891.

Form in which
Portions of this
Act may be
incorporated
with other
Acts.

5. And whereas it may be convenient in some Cases to incorporate with Acts of Parliament hereafter to be passed some Portion only of the Provisions of this Act; be it therefore enacted, That, for the Purpose of making any such Incorporation, it shall be sufficient in any such Act to enact that the Clauses of this Act with respect to the Matter so proposed to be incorporated (describing such Matter as it is described in this Act in the Words introductory to the Enactment with respect to such Matter,) shall be incorporated with such Act, and thereupon all the Clauses and Provisions of

this Act with respect to the Matter so incorporated shall, save so far as they shall be expressly varied or excepted by such Act, form Part of such Act, and such Act shall be construed as if the Substance of such Clauses and Provisions were set forth therein with reference to the Matter to which such Act shall relate.

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Preliminary.—With respect to the incorporation of a portion of one Act of Parliament in another, it is important to observe that by sect. 35, sub-sect. 3, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), “in any Act passed after the commencement of this Act, a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.”

I. Construction of introductory headings to clauses.

(a) The headings are to be considered as incorporated with the sections following for the purpose of ascertaining their meaning.

Illustrations.

(1) “On the other side, the question is whether the 137th section [of 12 & 13 Vict. c. cvi.] may not be construed differently, by reference to the mode recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute. The question then is, whether the introductory preamble to that set of clauses, beginning with the 133rd section and terminating with the 138th, is to be read as incorporated with each of those sections. In my opinion it must, in order to ascertain what the meaning of the Legislature was”: *per* Pollock, C.B., in *Bryan v. Child* (1850), 5 Ex. at p. 374.

(2) “I may observe that these headings in this Act [29 & 30 Vict. c. cclxxiii.] are no to be looked upon as marginal notes inserted, perhaps, not by Parliament, but by the

printer, because they are referred to in the body of the Act itself. The 386th clause itself takes notice of the headings of different parts of the Act, and shows that Parliament had carefully and analytically divided the Act into those different parts": *per* Cairns, C., in *Lang v. Kerr, Anderson & Co.* (1878), 3 App. Cas. at p. 536.

(b) Words of relation refer to the headings of the group of sections rather than to the preceding section in the same group.

Illustrations.

(1) The Lands Clauses Act is divided into different subjects by headings, which are accompanied by corresponding words in the margin. Thus, there is a division marked by the words "intersected lands" in the margin. In the body of the Act are these words, "And with respect to small portions of intersected land, be it enacted," &c. Here follow two sections, one of which, sect. 93, begins thus, "If any lands not being situate in a town," &c. The other, sect. 94, begins, "If any *such* land shall be so cut through and divided," &c. :—*Held*, that the word *such* in sect. 94 is not confined to "lands not being situate in a town," as described in sect. 93, but applies to the words in the general heading, "small portions of intersected land": *Eastern Counties Ry. v. Marriage* (1860), 9 H. L. Cas. 32; distinguished in *Union Steamship Co. of New Zealand v. Melbourne Harbour Trust Commissioners*, *infra*.

(2) "The case in the House of Lords of the *Eastern Counties Ry. v. Marriage* (*supra*) has been cited as an authority for the argument on the part of the plaintiffs. It should be observed as to that case, which dealt with the construction of the Lands Clauses Act, that in that Act were several headings so drawn as to be applicable grammatically to the sections which followed it. . . . That case appears to have no application to the present. Here the heading "officers" is not such a heading as could be grammatically read into any of the sections which follow": *per* Sir R. P. Collier in *Union Steamship Co. of New Zealand v. Melbourne Harbour Commissioners* (1884), 9 App. Cas. at p. 369.

(c) The headings may be referred to only to put a construction on a doubtful part of the statute, and not to limit any part of which the language is clear.

Illustrations.

(1) "But, although we may refer to the introductory words of the section to put a construction on a doubtful part of the statute, yet if the language of enactment is clear, and includes in express terms such an instrument as this, we should not be justified in limiting that sense by the introductory words": *per* Kelly, C.B., in *Latham v. Lafone* (1867), L. R. 2 Ex. at p. 119.

(2) "The sections of the Railways Clauses Act are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following; and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading": *per* Chelmsford, C., in *Hammersmith and City Ry. v. Brand* (1869), L. R. 4 H. L. at p. 203.

Lord Cairns, however, says, at p. 216: "The frame of the Lands Clauses Act shows that it is even dangerous to trust to the headings which occur at the commencement of these *fasciculi* of clauses, for the purpose of restraining or confining the natural operation of the words which you find in the various clauses under those headings."

II. Effect of excluding part of the Act.

(a) If the sections under a particular heading of the statute are

expressly excluded, the remainder of the Act will be deemed to be incorporated.

Illustration.

Sect. 19 of the London City Improvement Act, 1847 (10 & 11 Vict. c. cclxxx.), excluded "so much of the Lands Clauses Act as relates to the purchase of land otherwise than by agreement"; sect. 5 of the Holborn Valley Improvement Act, 1864 (27 & 28 Vict. c. lxi.), included the Lands Clauses Act except "the part with respect to the purchase and taking of lands otherwise than by agreement":—*Held*, that in both cases the only sections excluded were sects. 16—68 inclusive, which are headed "with respect to the purchase and taking of lands otherwise than by agreement": *R. v. London Corporation* (1867), L. R. 2 Q. B. 292. "The Lands Clauses Consolidation Act was passed to make a general code regulating the manner in which lands might be taken under the authority of Parliament, and compensation made for injury occasioned by what was thus legalised by the Legislature; and we think that, in construing any Acts of Parliament passed since that Act, we ought to suppose that the Legislature intended to follow this code, except where, by the express language of the special Act, or by necessary intendment from its provisions, it appears that the intention of the Legislature was in some particular to depart from that general code, and substitute something else. Now the Legislature has, with a view to facilitate the incorporation of the whole or parts of the code with any special Act, headed different sets of the clauses in the Lands Clauses Consolidation Act, which, in the language of that Act, form an 'enactment' with different headings, and have, by sect. 5, enacted that each such set of clauses may be incorporated by describing them as 'the clauses of the Act referring to the matter in the words introductory to the enactment intended to be incorporated': *per* Blackburn, J., at p. 295. "Amongst these enactments [in the Lands Clauses Act] is one including the clauses, sects. 16 to 68 inclusive. The words introductory to this enactment are, 'And with respect to the purchase and taking of lands otherwise than by agreement.' But, though the clauses under this introductory heading all do refer to the purchase and taking of land otherwise than by agreement, they are not by any means the only clauses that do so refer. The clauses 'with respect to the purchase-money or compensation coming to persons having limited interests or prevented from treating or not making title,' sects. 69 to 80, are all applicable to cases in which the lands cannot be taken by agreement. So are many of those relating to the 'conveyance of lands,' sects. 81 to 83": *per* Blackburn, J., at p. 296. "It is not enough that the words of the special enactments are not aptly chosen so as to be in harmony with the enactments in terms incorporated with the Act; nor is it even enough that the language of the special enactments is so incongruous with the incorporated enactments as to show that the person who prepared them had forgotten, or perhaps had never known what those incorporated enactments were. It must go so far as this—that the special enactments show that the Legislature intended to exclude an enactment which by an accident (not unlikely to occur in this mode of legislation) they have inadvertently incorporated contrary to what they intended": *per* Blackburn, J., at p. 299.

(b) Where by the special Act the introductory headings to groups of sections in the Lands Clauses Act are *ipsissimis verbis* incorporated or excluded, the whole of the sections belonging to such *fasciculi* are deemed to be incorporated or excluded. Therefore, if the provisions of the Act "with respect to the purchase and taking of lands otherwise than by agreement" are expressly excluded, sect. 68 is excepted from the special Act, and there is, in the absence of provisions similar to

those given by that section in the special Act, no right to compensation for land injuriously affected.

Illustrations.

(1) By sect. 2 of the City of London Sewers Act, 1848, the Lands Clauses Act was incorporated, but by sect. 3 so much of that Act as relates to "the purchase and taking of lands otherwise than by agreement" was excluded. F., whose property was injuriously affected by works under the special Act, claimed compensation under sect. 68 of the Lands Clauses Act:—*Held*, that all the sections (*i.e.*, sects. 16—68) headed "with respect to the purchase and taking of lands otherwise than by agreement" were excluded, and therefore that F. was not entitled to claim compensation: *Ferrar v. Commissioners of Sewers of London* (1869), L. R. 4 Ex. 227. "Now, here we have a series of clauses under the heading 'with respect to the purchase and taking of lands otherwise than by agreement,' and this heading occurs between sects. 15 and 16, and introduces all the sections from sect. 16 up to sect. 68, no other heading occurring till after that section, and then a new heading introducing sect. 69. It is therefore quite impossible to say that sect. 68 is not to be considered as included under that heading; it is necessary to make up the part introduced by the title prefixed to sect. 16, and which runs on to sect. 69. Being, therefore, included in that part, it is excluded by sect. 3 of the local Act": *per* Cockburn, C.J., at p. 231, *ib*.

(2) D.'s premises were injuriously affected by works executed under an improvement Act which incorporated the Lands Clauses Act "except the provisions of the last-mentioned Act with respect to the purchase and taking of land otherwise than by agreement." D. claimed compensation under sect. 68 of the Lands Clauses Act:—*Held*, that all the sections, including sect. 68 of that Act, under the heading "with respect to the purchase and taking of lands otherwise than by agreement" were excluded, and that therefore (even assuming that sect. 68 of itself gives a right to compensation) D. was not entitled to compensation either under the Improvement Acts or by action at law: *Dungey v. London Corporation* (1869), 38 L. J. C. P. 298.

(c) If the special Act incorporates or excludes parts of the Lands Clauses Act otherwise than by using the words in the introductory headings to groups of sections, the question whether particular sections are incorporated or excluded depends in each case upon the particular words used in the special Act.

Illustration.

A special Act excepted so much of the Lands Clauses Act as related "exclusively" to the purchase and taking of lands by compulsory procedure:—*Held*, that sect. 68 was not excepted, for that section, although inserted among the clauses relating to purchase by compulsion, does not relate "exclusively" to the taking of lands by compulsion: *Broadbent v. Imperial Gas Co.* (1856), 7 De G. M. & G. 436. This case was affirmed in the House of Lords (*see* 7 H. L. Cas. 600), but this point was not dealt with there. "If the clause in question does not relate exclusively to the taking of lands by compulsion, whatever might have been the meaning of the Legislature, they have in terms said that the Lands Clauses Consolidation Act, except so far as it relates to the taking of lands by compulsion, shall form part of the private Act. But the 68th section of the Lands Clauses Consolidation Act does not relate to the taking of lands by compulsion, although, providing a remedy for persons whose lands are injuriously affected but not taken; it is found, according to the style and fancy of the Legislature, inserted among those clauses

which relate to the taking of lands by compulsion. That, surely, cannot make the 68th section an enactment relating to the taking of lands by compulsion, when it obviously has reference to no such purpose": *per* Lord Cranworth, C., at p. 447.

Purchase of Lands by Agreement.

And with respect to the Purchase of Lands by Agreement, be it enacted as follows :

Power to purchase
Lands by
Agreement.

6. Subject to the Provisions of this and the Special Act it shall be lawful for the Promoters of the Undertaking to agree with the Owners of any Lands by the Special Act authorized to be taken, and which shall be required for the Purposes of such Act, and with all Parties having any Estate or Interest in such Lands, or by this or the Special Act enabled to sell and convey the same, for the absolute Purchase, for a Consideration in Money, of any such Lands, or such Parts thereof as they shall think proper, and of all Estates and Interests in such Lands of what kind soever.

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I. Meaning and object of sect. 6.

It will be seen, upon reading sects. 6 and 10 together, that property may be acquired, without any recourse to the compulsory powers provided in the Lands Clauses Act, by means of an agreement which must conform to the following conditions:—

- (i.) The agreement must be made “subject to the provisions of this and the special Act”;
- (ii.) The lands to be acquired under the agreement must be “lands by the special Act authorised to be taken”;
- (iii.) Such lands must be “required to be taken,” *i.e.*, their acquisition must be necessary for the execution of the works authorised by the special Act;
- (iv.) The agreement must be made with “*all* parties having any interest in such lands or by this or the special Act enabled to sell and convey the same”;
- (v.) The agreement must be “for the absolute purchase of the lands”;
- (vi.) The agreement for sale must be for a “consideration in money” or “in consideration of an annual rent-charge payable by the promoters of the undertaking” (*see* sect. 10, *post*).

II. Form and essentials of the agreement.

(a) As a general rule corporations can, at common law, only bind themselves by contract under seal, but they may be liable although there has been no contract under seal if they have had the benefit of the contract and it has been completely performed.

Illustrations.

(1) The solicitor of a railway company, with the authority of the directors, took rooms at a yearly rental of £100, which he occupied for two years. At the end of that time he left, giving no notice to quit. The plaintiff, the owner of the rooms, brought an action against the company for a year's rent, on the ground that the company were yearly tenants:—*Held* that, there being no agreement under seal, the company

were only liable for such time as they actually used and occupied the rooms : *Finlay v. Bristol and Exeter Ry.* (1852), 21 L. J. Ex. 117. "The instances where corporations have been held to have the power of binding themselves have been where the terms of their charter and the nature of their constitution have been such as to show it to have been the intention that they should be bound by their contracts not under seal. . . . By the ancient common law a corporation were at liberty to do little matters without seal, viz., to appoint a servant and the like ; but there is no case which goes the length of determining that they might contract not under seal, unless for small matters or *by virtue of the terms of their Act of Parliament*. . . . As a general rule a corporation cannot contract for an interest in land, except by an instrument under seal" : *per* Parke, B., at p. 120, *ib.*

(2) If the guardians of a poor law union, at a board properly constituted and authorised to enter into contracts, give orders to a tradesman to supply and put up water-closets in the union workhouse, and he puts them up, and the guardians approve and accept them, they cannot afterwards defend themselves in an action against them for the price, by showing that there was no contract under seal, as the purposes for which the guardians were made a corporation require that they should provide such articles : *Clarke v. Cuckfield Union* (1852), 21 L. J. Q. B. 349.

(3) Where goods, such as coals, have been supplied to and accepted by a corporation, *e.g.*, poor law guardians, and are such as must necessarily be from time to time supplied for the very purposes for which the corporation has been incorporated, the corporation are liable to pay for the goods although there has been no contract under seal : *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620.

(4) An agent of the defendant railway company agreed with the plaintiff, not under seal, that if he would build certain cottages upon land belonging to the company, the company would pay him 500*l.* a year by way of rent, the company to have an option to purchase them for 5,000*l.* The plaintiff built the cottages and for some years the company paid the 500*l.*, and then he refused to pay any more :—*Held*, that the contractor could not recover the money at law, as the contract was not under seal, and that equity did not help him : *Crampton v. Varna Ry.* (1872), L. R. 7 Ch. 562.

(5) Defendants, an urban authority, through their surveyor verbally ordered plans for offices from the plaintiff, an architect. He made the plans, which at first were approved, but afterwards abandoned as involving too much expense. New offices were necessary for defendants, and the plaintiff's plans were necessary for the offices, and the plans were worth 94*l.* Sect. 174 of the Public Health Act, 1875, enacts that "every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing, and sealed with the common seal of such authority" :—*Held*, that the plaintiff was not entitled to recover for the plans, as, even if the plaintiff had executed the consideration on his part, sect. 174 was not merely directory, but obligatory, so as to render all contracts exceeding in value 50*l.* unenforceable, unless the requirements of the section were complied with : *Hunt v. Wimbledon Local Board* (1878), 40 L. T. 115.

(6) The plaintiff was a contractor, and had executed certain drainage works, the value of which amounted to more than 50*l.*, for the defendant urban authority, under a contract not sealed :—*Held*, that he could not recover the price, sect. 174 of the Public Health Act, 1875, being obligatory and not merely directory : *Young v. Leamington Corporation* (1883), 8 App. Cas. 517.

(7) L. was employed by a committee of a rural district council as an engineer to supply a report and plans for a projected work. Sect. 174 of the Public Health Act did not apply. The resolutions of the committee as to the employment of L. were from time to time approved by the council, but there was no agreement under the common seal of the council. The plaintiff carried out the duties of his employment :—*Held*, that as the work was necessary for the council in carrying out the purposes for which it was

created, and as the council had accepted the work and the whole consideration for payment was executed, there was an implied contract to pay for the work, and the absence of a contract under the common seal was no answer to an action for the price of the work : *Lawford v. Billericay District Council*, [1903] 1 K. B. 772 ; approving *Clarke v. Cuckfield Union* and *Nicholson v. Bradfield Union*, *supra*.

NOTE.—It is not the province of this work to deal with the validity of contracts, but a marked distinction is drawn between contracts which are executed and those which are merely executory, and between those where sect. 174 of the Public Health Act applies and where it does not : see *Lawford v. Billericay District Council*, *supra* ; see p. 155, *post*.

(b) Effect of Part Performance.—When the contract is for the sale of land or any interest therein, and one party has performed his part of the contract, equity will enforce it, although it be not under seal.

Illustrations.

(1) A gas company employed L., but not under their seal, to distrain on the goods of C. for gas supplied to him. The company received from L. the proceeds of the distraint. It was held that a jury might infer the agency from the adoption by the company : *Smith v. Birmingham, &c., Gas Co.* (1834), 1 A. & E. 526.

(2) The agent of a railway company agreed with a landowner for the purchase of certain lands. The company took possession and made their railway, but the owner refused to sign the conveyance. In an action by the company for specific performance it was argued by the defendant that the company's agent did not appear to have been appointed under seal, and that there was no mutuality :—*Held*, that, the company having taken and used the land, this defence must fail : *London and Birmingham Ry. v. Winter* (1840), Cr. & Ph. 57 ; 54 R. R. 201.

(3) A railway company, acting under their statutory powers, gave L., the owner of certain land and messuages thereon, notice to treat for the purchase thereof. The owner thereupon delivered particulars of his interest in the property and claimed 1,500*l.* as the value of the premises, together with compensation. The company afterwards took possession of the land, without having agreed with the owner as to the price, and the owner accordingly served notice to summon a jury to assess the amount of compensation. The company having failed to summon a jury, the owner brought an action to recover the amount claimed by him. The company's solicitor shortly afterwards wrote to the plaintiff's solicitor as follows :—“In this case the company will pay the 1,500*l.* claimed for the purchase of L.'s interest.” The plaintiff (the owner) discontinued his action, and filed a bill for specific performance :—*Held*, that this letter constituted a contract by the company to purchase the plaintiff's reversionary interest in the property for 1,500*l.* : *Inge v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 3 De G. M. & G. 658.

(4) The plaintiff was anxious to have a siding in his yard connected with the defendant railway company's line. The company assented generally to the idea, and he spent some 1,200*l.* on making a tunnel, the details of which were arranged with the engineer of the railway company. Subsequently heads of an agreement were arranged, but no formal contract could be agreed upon and none was ever made :—*Held*, that the railway company could not stop the plaintiff using the line, but must allow him to continue to use it on reasonable terms : *Laird v. Birkenhead Ry.* (1859), 29 L. J. Ch. 218.

(5) The plaintiff had agreed with the defendant company to acquire from them certain land, on terms some of which could not be enforced by a decree for specific performance. There was no formal agreement or conveyance, but the plaintiff took possession of and

used the land. Subsequently the company repudiated the agreement. Specific performance was decreed against them, the Court pointing out that the enactments of the Companies Clauses Consolidation Act, 1845, as to the modes in which companies might enter into contracts, did not prevent the operation against the company of the ordinary equity based on part performance: *Wilson v. West Hartlepool Harbour and Ry.* (1865), 34 L. J. Ch. 241.

(6) The defendants four years previously had resolved to grant to the plaintiff a lease of part of the beach at Seaford. The plaintiff had enclosed it with a wall. The corporation subsequently repudiated the agreement and brought an action for ejectment. The plaintiff claimed specific performance, and the Court granted a decree, though the agreement was not under seal, the corporation having acquiesced in the spending of money by the plaintiff on the faith of the agreement: *Crook v. Seaford Corporation* (1871), L. R. 6 Ch. 551.

(c) Powers of committee of directors.

The Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 97, enacts as follows:—

“The power which may be granted to any such committee [*i.e., committee of directors*] to make contracts, as well as the power of the directors to make contracts on behalf of the company, may lawfully be exercised as follows (that is to say),—

“With respect to any contract which, if made between private persons, would by law require to be in writing, and under seal, such committee or the directors may make such contract on behalf of the company in writing, and under the common seal of the company, and in the same manner may vary or discharge the same :

“With respect to any contract which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company in writing signed by such committee or any two of them, or any two of the directors, and in the same manner may vary or discharge the same :

“With respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee or the directors may make such contract on behalf of the company by parol only, without writing, and in the same manner may vary or discharge the same :

“Such contract shall be binding upon the company and their successors.”

(d) Who are “owners” and “parties having any estate or interest” in lands.

The parties to the agreement, as vendors, are the “owners” of the lands “authorised to be taken” and “all parties having any estate or

interest" in the lands. Sect. 7 (*post*) specially enumerates the following, as being persons having an estate or interest: corporations, tenants in tail, or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of such lands in possession or subject to any estate in dower, or to any lease for life, or for lives and years, or for years, or any less interest.

The parties to the agreement, as purchasers, are those persons upon whom the powers required for carrying out the undertaking have been conferred.

With regard to municipal corporations, it is provided by sect. 107 of the Municipal Corporations Act, 1882 (the Act repealing sect. 6 of the Lands Clauses Act, 1860, as to all boroughs within its provisions), as follows:—

(1.) Where a municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the Treasury [for which the Local Government Board is now substituted by sect. 71 of the Local Government Act, 1888], purchase or acquire any land in such manner and on such terms and conditions as the [Board] approve, and the same may be conveyed to and held by the corporation accordingly.

(2.) The provisions of the Lands Clauses Consolidation Acts, 1845, 1860 and 1869, relating to the purchase of land by agreement, and to agreements by sale, and conveyances, sales and releases, of any lands or hereditaments, or any estate or interest therein by persons under disability, shall extend to all purchases of land under this section.

III. Contracts made by promoters before passing of the Bill.

(a) Contracts made by the promoters of a company subsequently incorporated are, it would seem, enforceable against the company upon incorporation provided such contracts are *intra vires* of and have been recognised or adopted by the company (*see, however, Railways Construction Facilities Act, 1864, post*).

Illustrations.

(1) The directors of a company, for the incorporation of which a Bill was pending in Parliament, had projected a railway to cross a certain turnpike road. The trustees of the road had taken measures to oppose the Bill unless certain clauses restricting the general powers as to such road proposed to be contained in the Bill were introduced into it. The company, through its agent, agreed with the trustees that, instead of such protecting

clauses being inserted in the Act, the substance of them should be embodied in an agreement between the company and the trustees. One of these terms was that the trustees should not further oppose the Bill, and accordingly they withheld opposition. The Act passed, without the clauses put forward by the trustees :—*Held*, that the company could not, as against the trustees, exercise a power conferred by the Act in breach of the terms of the agreement : *Edwards v. Grand Junction Ry.* (1836), 1 Rail. Cas. 173.

(2) A railway was promoted which would pass over the plaintiff's land. The plaintiff opposed the project, but on the agent for the promoters agreeing in writing to pay him 20,000*l.* for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time a rival railway line between the same termini was projected which also would pass through the plaintiff's estate, but not through the same part of it as the former line ; fourteen acres of the plaintiff's land were required for the former line and sixteen acres for the latter. The plaintiff opposed the latter railway also. The agents for the rival projectors entered into and signed an agreement (which was approved of and signed by the plaintiff's agent) by which they agreed that the first line should be abandoned and the second adopted, and that the adopted line should take over the engagements entered into with the landowners by the abandoned line ; and thereupon the plaintiff withdrew his opposition to the adopted line and the Act for making the second railway and for incorporating the promoters of it was passed :—*Held*, that the incorporated company was bound to perform the agreement made with the plaintiff by the promoters of the first railway : *Stanley v. Chester and Birkenhead Ry.* (1838), 9 Sim. 264 ; affirmed, 3 Myl. & Cr. 773.

(3) The committee of certain subscribers, applying for an Act to authorise the formation of a railway, entered into an agreement with the plaintiff, through whose estates the railway would pass, that in consideration of his withholding his opposition to their Bill, the incorporated company in the event of the railway being under the powers of their Act made to pass through the plaintiff's estates in the line laid down on their Parliamentary plan, should, previous to entering thereon, pay to the plaintiff the sum of 120,000*l.* for the value of the land and for compensation and that the company should within three weeks after their incorporation ratify the agreement. The plaintiff withheld his opposition and the Bill passed into an Act. The incorporated company refused to ratify the agreement, and, being empowered by their Act to take compulsorily the plaintiff's land in the line mentioned in the agreement, served on him a notice to treat for the same. The plaintiff obtained an injunction restraining the company from proceeding to assess the value of the land ; and the injunction was afterwards continued, notwithstanding the tender of an undertaking by the company not to enter on the land until the further order of the Court, and notwithstanding the time during which the company were authorised to take lands for the railway would have expired before the hearing of the cause : *Petre (Lord) v. Eastern Counties Ry.* (1838), 1 Rail. Cas. 462.

(4) Lord H. agreed with a railway company, under seal, to withdraw his opposition to their Bill in consideration of an undertaking by them to deviate the proposed line, if possible, and to pay Lord H. the sum of 5,000*l.* within six months after the passing of the Bill, as compensation for the injury that he would sustain :—*Held*, that the agreement was valid, inasmuch as Lord H., although a peer, had a right to bargain in his individual character for compensation for injury to his property, and it was not shown on the record that the money was promised as a consideration for a vote being given or withheld ; or that the parties intended to conceal it from the shareholders or from the Legislature ; or that any fraud was intended or committed : *Simpson v. Lord Howden* (1842), 9 Cl. & F. 61.

(5) The plaintiff was lessee, subject to six months' notice, of premises required by the defendant company. It was agreed that the plaintiff would not oppose the Bill for the defendants' railway, and that the defendants would purchase his leasehold interest no

his giving them notice to do so. The plaintiff gave the required notice, but the company, having acquired the reversion of his premises, gave him notice to quit. The Court, however, refused to make an order for ejectment until the company should have carried out their agreement and purchased the leasehold interest of the plaintiff: *Doo v. London and Croydon Ry.* (1839), 1 Rail. Cas. 257.

(6) The promoters of a railway company were applying to Parliament for an Act authorising the construction of a railway. The plaintiff was opposing the Bill. The promoters agreed with him that he should assent to the Bill if it should become law during that or the following session, and that in consideration of such assent, in the event of the Bill passing during that or the following session, the company would pay for such land as might be required at a fixed rate, and also 3,000*l.* for general damage:—*Held*, by Parke, B., and Platt, B. (Pollock, C.B., dissenting), that the 3,000*l.* became payable on the passing of the Bill into law, though the railway had not been constructed and no damage had been suffered by the plaintiff: *Bland v. Crowley* (1851), 6 Rail. Cas. 756.

(7) A railway company, having applied for an Act to extend their line, was opposed by a landowner; whereupon an agreement was entered into between the solicitor of the company and the landowner that the latter should withdraw his opposition, and, if the Act passed, that the company should purchase his land on certain terms. Neither the appointment of the agent nor the agreement was under the seal of the corporation. The Act passed, but the company did not take the land. The Court, considering that the company had done no act to take the benefit of the contract, refused a decree for specific performance, and declined to order the company to admit the validity of the contract in order to enable the plaintiff to try his right at law: *Gooday v. Colchester Ry.* (1852), 17 Beav. 132.

(8) Where an agreement between a peer and a railway company provided that the company should take certain portions of his land and pay certain sums of money therefor and by way of compensation for permanent injury to his mansion and estate, and should execute certain works of utility and ornament on his land, and make a station at a particular spot, with every accommodation for passengers and goods, &c., and that in consideration of the premises the peer should withdraw his opposition to the company's Bill and co-operate with them in opposing the Bill of a rival company:—*Held*, that there was no objection to the agreement with reference to the position of the peer as a member of the Legislature: *Lindsey (Earl) v. Great Northern Ry.* (1853), 10 Hare, 665.

(9) The promoters of a railway Bill entered into a contract with a landowner to purchase land. The company's Act passed, but the undertaking was abandoned. The company had staked out the intended line, but otherwise did nothing to adopt the contract:—*Held*, that the company were not bound by the contract: *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Ry.* (1853), 17 Beav. 114.

(10) The directors of the defendant railway company had applied to Parliament for a Bill authorising the construction of a branch line which would touch the land of the plaintiff, and also a divergent line which would cut through it. He agreed with the company to withdraw his opposition to their Bill in consideration of their purchasing his land for an agreed price and paying a certain sum as compensation. The Bill passed authorising the branch, but not the divergent line. Subsequently the directors determined to postpone making the branch, and they refused to take the plaintiff's land. He filed a bill:—*Held*, by the House of Lords, that the agreement, being in furtherance of the general objects of the company, was *intra vires* of the directors: *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331. "During the argument there was much discussion upon the question how far such a company is bound by contracts entered into by the promoters of the Act of Parliament by which the company is constituted. That question really does not properly arise here; but I think it right to guard myself against the peril of being supposed to

acquiesce in the doctrine contended for by the respondent's counsel, that there is complete identity between the promoters of the Act and the company, and that, as soon as the Act has received the Royal assent, a bill in equity might be filed against the company for specific performance of any contracts respecting land into which the promoters had entered. If the company should adopt the contract, and have the full benefit of it, I think the company would be bound by it in equity, and therefore I approve of the decision in *Edwards v. Grand Junction Canal Co.*, 1 My. & Cr. 650, although the language of Lord Cottenham in that case may require qualification": *per* Lord Campbell, *ib.* at p. 356.

(11) "I am of opinion that, on principle, there is no ground for holding that a company is bound by any engagement made by those who obtained its Act of incorporation, unless those engagements are embodied in the terms of the Act itself. . . . The result is that in the three cases to which I have referred [*Edwards v. Grand Junction Ry.* (*supra*), *Stanley v. Chester and Birkenhead Ry.* (*supra*), and *Petre (Lord) v. Eastern Counties Ry.* (*supra*)], Lord Cottenham acted on the principle that a company incorporated by Act of Parliament is, or may be, bound by the previous contracts of those by whom the Act of incorporation has been obtained. I have stated my reason for thinking that such a doctrine rests on no sound principle, and may lead, as in *Lord Petre's Case* I think it did lead, to great injustice. And if, therefore, the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be whether I should advise your lordships to adhere to the precedents established by Lord Cottenham, on the ground that it is unsafe to act against a series of decisions, even though it may appear not to rest on any solid foundation, or to depart from them and to adopt what I consider a just and more correct principle. I am, however, relieved from the necessity of coming to any positive decision on this point, because I think the present case is distinguishable from those decided by Lord Cottenham, and so that even if those authorities are to be held binding, still they do not govern the present case. In all the cases before Lord Cottenham the contracts which he held to be binding on the company were contracts to do things warranted by the terms of the incorporation. . . . But here, what the projectors of the railway contracted to do . . . is to apply the funds raised under legislative authority for the purpose of the railway to an object foreign from that of the railway": *per* Lord Cranworth, in *Caledonian Ry. v. Helensburgh (Magistrates)* (1855), 2 Macq. 391 at pp. 408, 415, 416.

(12) Where the projectors of a railway company, in order to induce a landowner to withdraw his opposition to their Bill, enter into a contract with him, in which there is a stipulation that the contract is to be performed by the company after the company shall have obtained an Act of incorporation from Parliament, such contract to be valid ought to be one which might be lawfully made by the company after incorporation: *Preston v. Liverpool, Manchester, &c., Ry.* (1856), 5 H. L. Cas. 605.

(13) A landowner withdrew his opposition in Parliament to a harbour and railway Bill upon an agreement with the promoters that the company would take his land on certain terms. After the Act had passed, the landowners brought an action for breach of the agreement against the promoters, which was stayed on the company being, by arrangement, made defendants to a new action, and suffering judgment for the demand:—*Held*, that the company thereby adopted the agreement, whether it would have been otherwise binding on them or not (as to which *quære*), and that it was not vitiated by one of its terms, being that the company should pay the costs of the landowner's opposition to the Bill: *Williams v. St. George's Harbour* (1858), 2 De G. & J. 547.

(14) Before applying for powers, the promoters of a railway entered into negotiations with the owners of the land through which the projected line was intended to pass, and a large number of owners, being anxious to get railway communication for their district, agreed with T., the agent of the promoters, that, in the event of an Act being passed in

the sessions of 1859 or 1860, they would sell whatever land might be required at the rate of thirty years' purchase upon the annual rental. The Bill failed to pass in 1859, but did pass in 1860, subject to some change in the course to be taken by the line:—*Held*, that the agreement was binding upon the landowners, and that specific performance should be decreed at the suit of the company, notwithstanding objections for want of privity, want of consideration, want of mutuality, and vagueness: *Bedford and Cambridge Ry. v. Stanley* (1862), 2 J. & H. 746. "If an agreement is entered into by promoters, which it would be competent for the directors of the company to make upon the passing of their Act, and if the contract is a beneficial one for the company, there can be no reason for saying that the agreement is not binding. The case may be justly compared to that of a person contracting (before Lord Cranworth's Act) to purchase an infant's land at a certain price, in case an Act of Parliament should be obtained to sanction the sale. It is beyond all question that, upon the Act being passed, the purchaser could not possibly dispute the agreement": *per* Wood, V.-C., at p. 759, *ib*.

(15) C. sold land to a railway company. In the conveyance the company were bound to make and maintain a bridge thirty-five feet wide, leaving a road fifteen feet wide under it. The company were amalgamated with another railway company, and the latter proposed to widen the bridge to fifty-five feet:—*Held*, that both companies were bound to maintain the bridge of the width and height originally fixed: *Edinburgh and Glasgow Ry. v. Campbell* (1863), 9 L. T. 157.

(16) "We have, on the one hand, in favour of the view that contracts with promoters are binding on the company, the authority of three actual decisions of Lord Cottenham in the cases of *Edwards v. Grand Junction Ry.* (*supra*), *Stanley v. Birkenhead Ry.* (*supra*), and *Lord Petre v. Eastern Counties Ry.* (*supra*). In these cases Lord Cottenham decided, unquestionably and distinctly, that the contracts of promoters are, or may be, binding on the company. We have, on the other hand, observations made by learned judges, certainly not overruling the decisions of Lord Cottenham, but tending to throw doubt on the propriety of those decisions—I mean Lord Campbell and the present Master of the Rolls. In addition to that we have strong expressions of opinion by Lord Cranworth, supported by clear and forcible reasoning in the two cases referred to of *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Ry.* (*supra*) and *Caledonian Ry. Co. v. Magistrates of Helensburgh* (*supra*) in favour of holding that the company ought not to be bound by the pecuniary contracts of the promoters unsanctioned by the Legislature. In the second of those two cases, after having taken time to deliberate upon the matter, in a carefully prepared judgment, his lordship expressed himself very strongly against the view of Lord Cottenham in the three cases to which I have referred, and doubted whether he should not advise their lordships to declare that those decisions of Lord Cottenham were no longer to be considered as law; but he hesitated to do so, from a reluctance to disturb that which had been for a certain time acted upon, and considered to be the law of the land, especially as it was not necessary in that case to call upon their lordships to pronounce a decision one way or the other upon the abstract question, inasmuch as there the particular contract was *ultra vires* of the company. He held distinctly, and the House of Lords must be taken to have so decided that, Lord Cottenham's decision, even supposing it to be right, did not apply to any contract of the promoters where the thing contracted to be done was *ultra vires* of the company": *per* Kindersley, V.-C., in *Shrewsbury (Earl) v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593 at pp. 616, 617.

(17) Where a contract is signed by one who professes to contract "as agent," *e.g.*, the promoters of a projected company, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability: *Kelner v. Baxter* (1866), L. R. 2 C. P. 174.

(18) The appellant company's agent made a contract with Mrs. de Carrey respecting certain mining rights in land belonging to the appellants. By a subsequent agreement

between Mrs. de Carrey and one L. "in his capacity as a provisional director of the Pauline Colliery, &c., Syndicate about to be registered," Mrs. de Carrey sold her interest in the contract with the appellants. Afterwards the Pauline Colliery, &c., Syndicate was incorporated, and, relying on certain correspondence, asked for specific performance of the contract between the appellants and Mrs. de Carrey, in whose shoes they claimed to stand:—*Held*, that there was no contract between the appellants and themselves, and consequently that the claim for specific performance failed: *Natal Land and Colonization Co. v. Pauline Colliery and Development Syndicate*, [1904] A. C. 120. "Their lordships . . . are clearly of opinion that there was no contract between the appellants and the respondents. The contract was made with Mrs. de Carrey, and even if she can be treated as having made it on behalf either of the unincorporated syndicate, who were the promoters of the respondent company, or on behalf of the company itself when incorporated, it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. It is unnecessary to cite all the cases in which this has been decided from *Kelner v. Baxter* (*supra*) downwards. But the facts may show that a new contract was made with the company after its incorporation on the terms of the old contract": *per* Lord Davey at p. 126, *ib.*

NOTE.—Under the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), provision is made for power being given to promoters for the construction of a railway by a certificate of the Board of Trade, and by sect. 30 of the Act it is provided that "contracts relative to the purchase or taking of lands for the railway, entered into by the promoters before the incorporation of the company by the certificates, shall be as binding on the company as if they had been entered into by the company."

(b) An agreement made with a landowner by an already existing railway company to take effect on the passing of a Bill, then pending, for an extension or alteration of the undertaking—which agreement provides, *inter alia*, for the withdrawal of such landowner's opposition to the Bill—is to be regarded as if it had been *de facto* made after the passing of the Bill.

Illustration.

In the year 1865 the directors of the C. and M. Railway were about to apply for an Act authorising the construction of a branch railway, which was intended to pass through land belonging to T. The directors having received notice of opposition from T., agreed with him, for the purpose of obtaining the withdrawal of his opposition, upon the purchase of several pieces of his land (about twenty acres) at the price of 2,000*l.*; and further agreed to pay him the sum of 2,000*l.* not later than three months after the Bill was passed, by way of personal compensation to him for the inconvenience, disturbance damage and injury which he might sustain in respect of the sporting and preservation of game upon his estate. The Bill passed, but the money not being paid, T. brought his action to recover the agreed sums. It was pleaded, in defence, that the railway had not yet been constructed; that none of T.'s land had been taken; and that he had sustained no loss nor had suffered any annoyance:—*Held*, that the agreement was enforceable, for the true effect of it was to place T. in as good a position in the matter as if he had entered into the agreement with the directors *after* they had obtained their Parliamentary powers: *Taylor v. Chichester and Midhurst Ry.* (1870), L. R. 4 H. L. 628. "The agreement was entered into by the respondents under their common seal, and we are freed, therefore, from any question which might arise on a contract made by the promoters of an intended railway before the Act of Parliament, which was to give the company a legal existence,

had been actually passed, as to which question, your lordships are well aware, there has been a great deal of discussion and inquiry. This, however, is the agreement of its directors of an existing company itself": *per* Lord Hatherley at p. 637, *ib.*; see also *Eastern Counties Ry. v. Hawkes*, *ante*, p. 32, and see *post*, pp. 46, 56.

(c) The terms of an assent to a Bill to be enforceable against the company should be adopted in the Act or embodied in an agreement.

Illustrations.

(1) The trustees of a turnpike road agreed to assent to a Bill in Parliament for the formation of a railway upon condition that the railway should pass over the road at a sufficient elevation, and that the road should not be lowered or otherwise prejudiced. This qualified assent was returned in both Houses of Parliament; and the Bill passed. Sect. 12 of the Act authorised the company (*inter alia*) to raise or sink rivers or streams, roads or ways, so as the better to carry the same over or under or alongside the railway, provided that the company should not divert obstruct or impound any river or water to the prejudice of any mill or manufactory. Sect. 72 enacted that the arch of any bridge for carrying the railway over or across any turnpike road should be of a height from the surface of such road to the centre of such arch of not less than 16 feet, provided that the descent under any such bridge should not exceed 1 in 30 feet. The Act contained no particular *proviso* as to the turnpike road in question:—*Held*, that the modified assent of the road trustees, the terms whereof were neither embodied in any agreement between the trustees and the railway company, nor adopted by the Legislature, constituted no equitable ground for restraining the company from enforcing, with respect to the road in question, all the powers conferred by the Act; further, that the company were authorised to sink the original surface of a turnpike road in order to give the specified elevation to the arch of a bridge erected for carrying the railway over the road, notwithstanding that the effect, owing to the peculiar situation of the road, would be to render it liable to occasional flooding: *Aldred v. North Midland Ry.* (1839), 1 Rail. Cas. 404.

(2) The plaintiff being opposed to the proposed railway of the defendant company, which line would pass through his land, petitioned Parliament against it. The promoters proposed to him that if he would permit them to acquire, under the terms prescribed by their Acts, whatever of his land they required for the railway, they would construct a siding for him. The plaintiff assented, and withdrew his opposition. The Bill passed. The company undertook, by agreement under their common seal, to perform the promise made by the promoters, but afterwards refused to make the siding:—*Held*, that the performance of agreement ought to be compelled: *Greene v. West Cheshire Ry.* (1871), L. R. 13 Eq. 44.

(d) A covenant entered into by the promoters of a company merely to pay a sum of money to a person for offering to withdraw his intended opposition to a Bill is not binding on the company when formed, since such a payment would be *ultra vires* of the company itself.

Illustrations.

(1) It is *ultra vires* of a corporation established for the purpose of making a railway, to enter into a covenant to pay a large sum of money to a man for not opposing the passing of the company's Bill in Parliament: *Preston v. Liverpool, Manchester, &c., Ry.* (1856), 5 H. L. Cas. 605.

(2) A contract by the promoters of a railway company to pay a landowner 20,000*l.* for his countenance and support in obtaining their Act and the ratification of such

contract by the directors of the company after its formation were held *ultra vires* of the company, and not enforceable against the company as payment of expenses of obtaining the Act under sect. 65 of the Companies Clauses Act or otherwise: *Shrewsbury (Earl) v. North Staffordshire Ry.* (1865), L. R. 1 Eq. 593.

(e) If a projected undertaking is afterwards transferred to, or amalgamated with, another company, the benefit and liability arising under a valid contract made by the promoters of the undertaking transferred or amalgamated will pass to the new company.

Illustrations.

(1) A number of persons calling themselves the L. and N. Y. Railway Company, in consideration of P.'s withdrawing his opposition to their Bill in Parliament, agreed to pay P. a large sum for his land, residential injury, &c. Afterwards these persons arranged to join a rival company, called the L. M. and N. Company, in applying for an Act to make a line which, so far as P.'s land was concerned, was the same as that of the L. and N. Y. Company. The Act passed, and by it the two companies were incorporated under the name of the L. M. and N. Railway Company:—*Held*, that the incorporated company must be deemed to be the parties on whose behalf the agreement had been made with P.: *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Junction Ry.* (1851), 1 Sim. (N.S.) 586; see S. C. in H. L., *ante*, p. 36.

(2) L., a landowner, through whose estate a part of a projected railway was to pass, became a party to a deed with the promoters of the railway, by which he covenanted to withdraw his opposition to their Bill and to oppose a rival Bill, and they covenanted to pay him a certain sum of money in case their Bill should pass within six months from the date of the deed, or to pay him a different sum if the rival Bill should pass within eighteen months from the date of the deed. It was then provided that if the Bill of these promoters should not be passed within six months from the date of the agreement, either party might put an end to the agreement by notice. There was also a covenant by the promoters that if the two companies should be amalgamated they would pay a certain sum within three months after such amalgamation. The deed was dated March 16th, 1846. The two companies were amalgamated in June, 1846; but no Bill ever passed at the instance of these promoters alone. In November, 1846, these promoters gave notice to put an end to the agreement. L. declared in covenant against the promoters on that clause of the deed by which he was to receive a sum of money within three months after the amalgamation of the companies. The defendants pleaded that their Bill had never passed into law; that at the end of six months they had given notice to put an end to the agreement; and that they had not taken the plaintiff's land:—*Held*, that this plea was no answer to the action; *Capper v. Lindsay (Earl)* (1851), 3 H. L. Cas. 293.

(f) In some cases the Court will order an inquiry as to damages instead of decreeing specific performance of the agreement.

Illustration.

A landowner petitioned against a Bill authorising a railway. The company agreed that in consideration of A. withdrawing his opposition they would erect a station on certain land to be purchased from him. The Act was passed and the land was bought, but the company refused to build the station. It was *held* that justice could be better done by an inquiry as to damages than by a decree for specific performance: *Wilson v. Northampton and Banbury Junction Ry.* (1874), L. R. 9 Ch. 279.

IV. Unauthorised acts of company.

(i.) Generally.

- (a) An agreement made, or any act done, by a company, or on its behalf, which is not within the objects or purposes for which the company was established will be *ultra vires* and void, unless ancillary to the main objects of the company or reasonable and proper in carrying out such main objects or some of them.

Illustrations.

(1) The directors of a railway company proposed to guarantee the interest and capital of a steam-packet company, which was to run its steamers in connection with the railway. The running of such steamers was not within the powers of the railway company. An injunction was granted to a shareholder of the railway company restraining the directors from so using or risking the capital of the company: *Colman v. Eastern Counties Ry.* (1846), 10 Beav. 1.

(2) By a special Act the conservators of certain river banks were empowered to apply the funds under their control "in doing, constructing and executing all such works, acts, matters and things as they should from time to time deem necessary, proper or expedient for putting the banks into and maintaining the same in a permanent state of stability":—*Held*, that they were authorised to apply a portion of the fund in watching, and, if necessary, opposing, a Bill in Parliament for a project lower down the river which was likely to be injurious to the part under their superintendence: *Bright v. North* (1847), 2 Ph. 216.

(3) "I think there lies at the root of this case a question of public policy which precludes the interference of the Court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railways Company without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Railways Company. All the stock of the company is to be taken by the plaintiffs without any obligation to restore it. The plaintiffs are to manage and regulate the railways of the East Anglian Railways Company for the purposes of this agreement, and although, in form, it is declared that the instrument shall not operate as a lease or agreement, it amounts, in substance, either to one or the other. It is framed in total disregard of the obligations and duties which attach to these companies, and is an attempt to carry into effect, without the intervention of Parliament, what cannot lawfully be done except by Parliament, in the exercise of its discretion with reference to the interest of the public. It is true that the plaintiffs do not found their case upon this agreement, and that whether the injunction be granted or not, the agreement remains in force; but it is not less true that the interference of the Court will promote the object of the agreement, and extend and facilitate its operation; and I think it the duty of this Court to withhold its interference when called upon to act in aid of agreements of such a nature": *per* Turner, V.-C., in *Great Northern Ry. v. Eastern Counties Ry.* (1851), 21 L. J. Ch. at p. 840.

(4) Where a railway company attempted to construct a bridge over a river at a place not authorised by their Act, and built a pier, also unauthorised, the Court was much divided in opinion as to the effect in law of these acts, Campbell, C.J., and Wightman, J., holding that the agreement with regard to these matters, made between the railway

company and the local authority, was, in substance, an agreement to commit an indictable offence, and therefore illegal; while Coleridge, J., and Erle, J., held that it was an agreement to procure the making of works, not of necessity by illegal means, and hence not objectionable on this ground; but Campbell, C.J., held that the agreement was *ultra vires* of a corporation created for the purpose of making a specific railway, and void on that ground: *Norwich Corporation v. Norfolk Ry.* (1855), 4 El. & Bl. 397.

(5) A company which is doing an illegal act, injurious to the public, can be restrained by injunction on an information by the Attorney-General at the relation of a stranger to the company. The Great Northern Railway Co. acted as coal merchants on a large scale between 1852 and 1859. They were restrained by injunction at the relation of a coal owner: *Att.-Gen. v. Great Northern Ry.* (1860), 29 L. J. Ch. 794.

(6) The G. W. Railway Co., being empowered to take shares in the M. Company, took shares, to the full extent authorised, in the names of nominees who were registered as holders of them. The M. Company, being afterwards empowered to extend their undertaking and to create new shares for that purpose, resolved, at a general meeting, to allot the new shares rateably among the proprietors of the original shares:—*Held*, that it was *ultra vires* for the G. W. Railway Co., to take any of the new shares; and that the M. Company could not be compelled to allot any either to the G. W. Railway Co. or to their nominees: *Great Western Ry. v. Metropolitan Ry.* (1863), 1 N. R. 551.

(7) The Act for improving the drainage and navigation of the Middle Level of the Fens, 7 & 8 Vict. c. cvi., s. 217, enacts that “if any person or body at any time after the said Drainage Commissioners, &c., shall have begun to carry this Act into execution, shall happen to sustain any damage or injury to his lands, &c., by or in consequence of any act of the said Commissioners for drainage, or their agents workmen or servants . . . for which no recompense or satisfaction is hereby otherwise provided,” he may proceed for compensation. *Seem* that this section, taken alone, might apply to unauthorised as well as to authorised acts of the Commissioners, on the principle that omission to act may in some cases be said to be an act; but *held*, by the Exchequer Chamber, that the Act, taken as a whole, repelled this view: *Coe v. Wise* (1866), 7 B. & S. 831.

(8) A railway company was authorised to enter into certain agreements when the Board of Trade had certified that half the capital had been paid up and expended in carrying out the objects of the undertaking. Such agreements were to be approved by three-fifths of the shareholders. An agreement was entered into before any certificate was obtained, having been approved by three-fifths of the shareholders; it was acted on for many years, and it was referred to in the preamble of an Act of Parliament, but not expressly confirmed therein:—*Held*, that the agreement was invalid: *Kent Coast Ry. v. London, Chatham and Dover Ry.* (1868), L. R. 3 Ch. 656.

(9) A company was formed “to carry on the business of mechanical engineers and general contractors; to purchase, lease and sell mines, minerals, lands and buildings”:—*Held*, that the words “general contractors” only authorised the company to enter into such contracts as would be entered into by mechanical engineers; and that the company could only acquire mines, minerals, lands and buildings for the purposes of such mechanical engineering contracts: *Ashbury Railway Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653.

(10) “I take it that, as far as the main point to be considered is concerned, this House has no more right than any other tribunal to depart from the principle of the decisions which have already been arrived at; more particularly I allude to the last case of *The Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653. That case appears to me to decide, at all events, this—that where there is an Act of Parliament creating a

corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited, and consequently that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose. My lords, I quite agree with what Lord Justice James has said on this first point as to prohibition—that those things which are incident to, and may reasonably and properly be done under, the main purpose, though they may not be literally within it, would not be prohibited”: *per* Lord Blackburn, in *Att.-Gen. v. Great Eastern Ry.* (1880), 5 App. Cas. at p. 481.

(11) The law laid down by the House of Lords in *Ashbury Co. v. Riche* (*supra*) applies to all companies created by any statute for a particular purpose, and not only to companies created under the Companies Act, 1862: *Baroness Wenlock v. River Dee* (1885), 10 App. Cas. 354.

(12) The appellants, promoters of a company incorporated by Act of Parliament, who were also respectively solicitor and engineer, agreed, in consideration of a lump sum, to bear all the expenses of obtaining the Act:—*Held*, that such agreement, even if approved and adopted by the directors and shareholders, was *ultra vires* and void, and that the appellants were bound to account for all sums beyond those actually expended by them in obtaining the Act: *Mann v. Edinburgh Northern Tramways*, [1893] A. C. 69. “The learned Lord Chancellor then goes on to lay it down that the only modes in which a company can apply its funds are those prescribed by its Act of incorporation, which is its charter. And in the case of *The Earl of Shrewsbury v. The North Staffordshire Ry.*, 35 L. J. Ch. 156, that is very distinctly indicated as the ground of the judgment in the very instructive judgment of Vice-Chancellor Kindersley, who points out that where the expenditure of money is for a purpose unauthorised by the Act, it is *ultra vires*, and there is no power in the company validly to make that payment”: *per* Lord Herschell, C., at p. 80.

- (b) Any individual member of a company has a right to restrain the company from using its funds for a purpose other than that for which its capital was subscribed.

Illustrations.

(1) In *Cohen v. Wilkinson* (1849), 1 Mac. & G. 481, Lord Cottenham, C., said that the main point in the case, viz., the right of an individual member of a company to restrain that company from applying its funds to a purpose different from that to which he had subscribed, was one well settled in that Court.

(2) An individual member of a corporation may sue the corporation to prevent the corporation from doing an act which is *ultra vires*. And when that act is the making of an agreement with a third party, such third party may be joined as a defendant and relief claimed against him. But no action under such circumstances can be brought by the individual member against the third party alone, unless the corporation has refused, or is unable, to bring the action: *Russell v. Wakefield Waterworks* (1875), L. R. 20 Eq. 474.

(ii.) In particular cases.

- (a) Agreements not to use compulsory powers are invalid.

Illustration.

Compulsory powers are granted for the public advantage, and an agreement not to use them is invalid. Trustees, incorporated under the Ayr Harbour Act, 1855, had given notice to treat (under the Lands Clauses Act) as to a strip of land adjoining the harbour of Ayr and forming part of the respondent's estate. The trustees had by a minute purported to bind themselves and their successors not to interfere with the access to the harbour from the remainder of the respondent's land. The question was whether this minute should affect the compensation payable :—*Held*, that the minute was invalid : *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, *vide infra*.

- (b) A company cannot agree to limit or vary the objects for which it has received its compulsory powers.

Illustrations.

(1) A railway company obtained an Act of Parliament authorising them to make a railway from Epsom to Portsmouth. The company subsequently abandoned their intention of making the railway between these places and proposed to use the capital subscribed in making a line from Epsom to Leatherhead. One of the original shareholders of the company brought an action to restrain them from making a portion of the line only :—*Held* that, the Legislature having sanctioned the whole work only, and the shareholders having subscribed their capital in the expectation of the whole work being done, the company must be restrained from carrying out only a portion of their original intention, which would be *ultra vires*, since it would necessitate their taking lands for purposes not specified in their special Act : *Cohen v. Wilkinson* (1849), 18 L. J. Ch. 378. “The obligation to complete the work appears to me to be co-extensive with the authority to make it. Neither this Act nor any of these Acts contain authority to substitute a less work, or part of the whole for the whole, and if the governors or directors of the company take on themselves to determine that they will not perform the whole work, but apply the capital collected on the faith of the whole work being completed, in completing only a part of it, I am of opinion that the determination is without authority, and contrary to the provisions of the Act of Parliament”: *per* Lord Langdale, M.R., at p. 384, *ib*.

(2) A statutory corporation cannot bind themselves to any course of conduct which would interfere with the carrying out of the objects for which they were created. Such an agreement would be *ultra vires* and wholly void, being in effect an agreement by the corporation not to do their duty : *Staffordshire Canal v. Birmingham Canal* (1866), 1 L.R. 1 H. L. 254.

(3) The appellants were empowered to take certain lands belong to O. While the amount of compensation was being determined the trustees purported to bind themselves to limit the use of the lands being acquired by them so as to decrease the injury done to the remaining property of O. The umpire gave alternative awards, depending on whether the trustees could so bind themselves. In an action by O. for the larger sum, it was *held* that, powers having been conferred on the trustees by statute for the public benefit, they could not bind themselves not to use those powers : *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623, *vide supra*.

- (c) Upon similar grounds a grant by a railway company of a right of way under arches upon which stood a station was held to be void.

Illustration.

A railway company purported to grant a right of way under arches upon which stood a station:—*Held*, that this was not superfluous land under sect. 127 of the Lands Clauses Act, nor land taken for extraordinary purposes under sect. 45 of the Railways Clauses Act, and could not be alienated: *Mulliner v. Midland Ry.* (1879), 11 Ch. D. 611.

- (d) A company cannot use their compulsory powers to take land that is not authorised to be taken or to do any other unauthorised act, and should they attempt to do so they may be restrained by the Court.

Illustrations.

(1) “But the defendants have no right to take the plaintiff’s soil without compensation, and the Legislature has wisely provided that such compensation shall be paid beforehand, for, if it were otherwise, bankrupt companies might enter upon any man’s land to carry on schemes which they could not afterwards pay for. They who enter in such cases must clearly show their authority, and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property”: *per* Best, C.J., in *Scales v. Pickering* (1828), 4 Bing. at p. 452.

(2) “I am not at liberty (even if I were in the least disposed, which I am not) to withhold the jurisdiction of this Court, as exercised in the first case in which it was exercised, that of *Agar v. Regent’s Canal* (1815), G. Cooper, 77; 14 R. R. 217; where Lord Eldon proceeds simply on this—that he exercised the jurisdiction of this Court for the purpose of keeping these companies within the powers which the Acts give them; and a most wholesome exercise of the jurisdiction it is, because, great as the powers necessarily are to enable the companies to carry into effect works of this magnitude, it would be most prejudicial to the interests of all persons with whose property they interfere if there were not a power for the purpose of keeping them within that limit which the Legislature has thought proper to prescribe for the exercise of their powers”: *per* Lord Cottenham, C., in *River Dun Navigation v. North Midland Ry.* (1838), 1 Rail. Cas. at p. 153.

(3) “From these several enactments it appears clearly to have been the intention of the Legislature that the parties incorporated should be empowered to construct the railway and hold it as their property, and derive certain profits from it, but that every member of the community should have an equal right to use it on the terms prescribed by the Act; and that the payment to be made for such use . . . should be reasonable and equal to all persons without reference to the particular advantage to be derived by any individual or class of individuals from such use. And it is to be observed that the language of these Acts of Parliament is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public”: *per* Tindal, C.J., in *Parker v. Great Western Ry.* (1844), 7 M. & G. at p. 288.

(4) “For though we accede to the general observation that persons obtaining from the Legislature, by Acts of Parliament like those now before us, powers to interfere with rights of property for their own purposes (whether of a local nature or merely private) are bound strictly to adhere to the powers so conceded to them—to do no more than the Legislature has sanctioned, and to proceed only in the mode which the Legislature has pointed out—yet

it does not follow that any one of Her Majesty's subjects has a right to complain whenever Parliamentary powers of this nature have not been strictly followed or are intended to be transgressed. In such cases (we, of course, except any proceeding at the instance of the Attorney-General) a plaintiff seeking the assistance of a Court of equity by way of injunction is bound to show that he has an interest in preventing the defendants from doing what is in fact, or may well be called, a violation of their contract with the Legislature. He must show not only that the defendants are committing or intend to commit a wrong, but also that the wrong complained of does occasion or will occasion a loss or damage to him; that he has a special or private interest in confining the defendants within the limits of their Parliamentary powers": *per* Lord Cranworth in *Liverpool Corporation v. Chorley Waterworks* (1852), 2 De G. M. & G. at p. 860.

(5) "If a railway company, disregarding the provisions of the Act, thinks fit to take possession of property, to act with a high hand and set the owner in defiance, this Court interferes and restrains the company from taking any further step in the matter; but it only does so if the owner comes with reasonable diligence, at the proper time, and without doing unnecessary injury to the company. But if a company acting *bonâ fide* take possession of property by mistake, and it is merely a question of value between the company and the owner, then I apprehend the Court does not act in the same way unless it is shown there has been culpable negligence on the part of the company": *per* Romilly, M.R., in *Wood v. Charing Cross Ry.* (1863), 33 Beav. at p. 294.

(6) A waterworks company having powers to take certain lands by a special Act which incorporated the Waterworks Clauses Acts, 1847 and 1863, proposed to construct an aqueduct by means of a tunnel through a field, and deposited plans which gave no indication of any works besides the aqueduct at this point. It afterwards appeared that they intended to sink a shaft to obtain additional water from the springs under the field and to erect pumping engines and other works on the surface:—*Held*, that the company had no power, under any of the Acts in question, to construct such additional works, and that, save for the temporary purpose of construction, they were not entitled to take and hold permanently any other portion of the lands in question than so much as was necessary for the construction of and would be contained within the tunnel according to the plans deposited: *Simpson v. South Staffordshire Waterworks* (1865), 13 W. R. 729.

(7) "The real question in this case . . . is whether the compulsory powers of this company extend to taking the plaintiff's land for this purpose. Under the Act of 1864 it is conceded that this particular thing could not be done. The preamble of the Act of 1864 has been read: it recites that it is expedient to take certain lands and houses in connection—that is the widest way of putting it—with the defendants' undertaking. Then those lands are specified, and the 6th clause says: 'Subject to the provisions in this Act and in the incorporated Acts contained, the company may enter upon, take and use all or any of the lands and other property shown on the plans and described in the book of reference so deposited as aforesaid.' Now, considering what the law with reference to these companies is, I can have no doubt that this company could only take those specified lands for lawful purposes—that is, the specified lands for such purposes as were authorised by this Act—and that the Act must be taken quite as strongly as if it had expressly said that the company should take the land for those purposes and for no other. . . . Then we come to the 58th section of this second Act, and beyond question all these compulsory powers are directly in derogation of private rights and must be read most strongly against the railway company and in favour of private rights. You cannot imply any extension of the compulsory powers unless there is a positive necessity for doing so. In this case there is no such necessity. . . . If companies wish to extend their compulsory powers, they should tell the public so plainly, and they should give the public the opportunity of appearing before Parliament and opposing them if they think fit": *per* Giffard, L.J., in *Lamb v. North London Ry.* (1869), L. R. 4 Ch. at p. 530.

(8) "I think that when the Legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them and their successors, to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in entrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal Co. v. Birmingham Canal Co.* (1866), L. R. 1 H. L. 254, and on which the late Master of the Rolls acted in *Mulliner v. Midland Ry.* (ante, p. 42)": per Lord Blackburn in *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. at p. 634.

(9) "Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment, so far as it makes provision on his behalf. It is idle for the promoters to say that they have given him all that he can want, or something just as good as that which the Act required them to give, or even something still better, if he only knew his own interest. It is enough for him to show that the thing which is offered is not the thing which the Act said he was to have. It is too late to call for a fresh deal at that stage of the game. Nor is it, I think, within the province of any tribunal to remodel arrangements sanctioned by Parliament, or to relax conditions which the Legislature has thought fit to impose": per Lord Macnaghten in *Herron v. Rathmines and Rathgar Improvement Commissioners*, [1892] A. C. at p. 523.

(c) Land which is authorised to be taken by a company for one purpose may not be taken by them for another purpose.

Illustrations.

(1) A railway company were empowered by an Act of 1864 to execute certain works, and to acquire (*inter alia*) certain land of the plaintiff. By an Act of 1865 the same company were empowered (*inter alia*) to construct a new street, not authorised by the earlier Act. The plaintiff had no notice of their intention to apply for the later Act, nor were the company empowered by that Act to acquire his land. An injunction was granted restraining the company from taking the plaintiff's land for the purpose of forming the new street: *Lamb v. North London Ry.* (1869), L. R. 4 Ch. 522.

(2) The London School Board were authorised to take compulsorily, for the purposes of the Education Acts, 1870 to 1899, certain premises the lease of which they had acquired. They gave notice to treat to the freeholder, gave a bond under sect. 85 of the Lands Clauses Act, entered into possession, pulled down buildings, and proceeded to erect others for the purpose of using them as a pupil teachers' centre:—*Held*, that the Board could not spend public money for such a purpose, that it was *ultra vires*, and that the freeholder was entitled to re-enter for breach of covenant: *Batson v. London School Board* (1903), 20 T. L. R. 22.

(f) Railway and other companies of the like nature may not take land which is not necessary for the purposes of the undertaking, but which is sought to be acquired for a collateral

purpose, as, *e.g.*, to enable an agreement with a third party to be carried out.

Illustrations.

(1) A railway company, having completed its line, gave notice to treat for certain lands, which were within the limits of deviation on the plans, but which were in fact only required by them to carry out an agreement made with a third party. They were restrained by injunction from further proceedings : *Vane v. Cockermouth, Keswick and Penrith Ry.* (1865), 12 L. T. 821.

(2) The W. Railway Co. before giving C., a landowner, notice to treat agreed with T., a third person, to convey to him so much of C.'s estate as lay between his land and the railway. The land in question contained 1a. 27p., the company used 3p. for the purposes of the railway and conveyed 1a. 24p. to T.:—*Held*, that C. was entitled to recover the land, by virtue of his right of pre-emption, as the company had taken the land, not for the purposes of the railway, but for a collateral object : *Carington (Lord) v. Wycombe Ry.* (1868), L. R. 3 Ch. 377.

NOTE.—In the following case a public body was allowed to take land to exchange with a third person, who agreed to use it in such a way as to benefit the undertaking.

(3) A school board were building new schools, and gave notice to treat (*inter alia*) for a strip of land adjoining the proposed schools. Before giving notice to treat they had arranged, subject to the consent of the Education Department, to exchange the strip in question for some land of B., who agreed to make the strip into a public road which would benefit the school :—*Held*, that the strip was acquired for the benefit of the school, and the board were entitled to take it : *Rolls v. London School Board* (1884), 27 Ch. D. 639.

- (g) Land cannot be taken for the purpose of making a road to accommodate a neighbouring landowner when such road is not shown on the plans, unless the company are compellable to carry out such works.

Illustrations.

(1) A railway company proposed to acquire certain land (included in their schedule) for the purpose of making a road to accommodate an adjoining landowner. The proposed road differed from that shown on the plans, and was not necessary for the purpose of constructing the line :—*Held*, that they could not use their compulsory powers for such a purpose : *Dodd v. Salisbury and Yeovil Ry.* (1859), 1 Giff. 158.

(2) The T. Railway Co. bought from B. a small piece of land, the whole of which, according to the original plan, would have been covered by the embankment of the railway. The company altered their levels so as to narrow the embankment and leave unoccupied a strip of the land purchased from B. This strip they turned into a road for the use of another landowner, for whom they were obliged to provide a communication between lands severed by the railway. B. thereupon, before the date fixed for the sale of the superfluous lands arrived, filed his bill to enforce the right of pre-emption as to the strip :—*Held*, that the land was not superfluous land, for the making of accommodation works which the company were compellable to make was one of the purposes of their Acts, and therefore B. had no title to relief, but that the suit was not premature, for the

landowner may sue as soon as the company have sold to someone else : *Beauchamp (Earl) v. Great Western Ry.* (1868), L. R. 3 Ch. 745. "Then the question is, whether the making accommodation works which the company are compelled to make is one of the purposes of their Acts? I take it that whatever they are compellable to do is a plain purpose of their Act, though it may be well argued it is not a purpose of the Act to do for their own accommodation anything which they are not compellable to do, and, accordingly, though the 45th section of the Railways Clauses Consolidation Act gives power to purchase lands for extraordinary purposes, it does not give the company power to take it compulsorily, the acquisition of land for those extraordinary purposes not being essential to the undertaking" : *per* Page Wood, L.J., at p. 751.

(3) W. and D. were the owners of two adjacent fields, across which, on an embankment, a railway was intended to pass diagonally. The company was established by an Act which incorporated the Lands and Railways Clauses Acts. It was at first intended to give W. and D. a separate occupation bridge or archway, under the embankment ; but the company afterwards proposed to place W.'s bridge near the boundary of the two fields, and to take two small pieces of his land on each side in order to give D. access to the bridge, and they therefore served notice to treat upon W. in respect of the two pieces of land. W. brought an action to restrain the company from taking proceedings under the notice to treat :—*Held*, that the company had power to take the strip of land compulsorily for the purpose proposed : *Wilkinson v. Hull Ry. and Dock* (1882), 20 Ch. D. 323.

- (h) When a railway company takes land in excess of its powers, but the quantity and value of the land are very small, the Court will not restrain the taking as a matter of course, but may give damages instead.

Illustration.

"I may also observe that the jurisdiction which the Court now has to give damages in lieu of an injunction might perhaps (I do not say that it would) have been properly exercised in a case like the present, had I been in favour of the plaintiffs, as to some one or more or even all of the pieces of land which they allege the company have improperly taken . . . and in reference to this it must be borne in mind that the value of all the land of the plaintiffs outside the limits of deviation taken by the railway company is but small" : *per* Hall, V.-C., in *Dowling v. Pontypool, Cwerleon, &c., Ry.* (1874), L. R. 18 Eq. at p. 747.

- (k) A contract under which the company becomes liable to pay money by way of compensation for damage which will never be incurred if the land is not taken, will nevertheless be binding upon the company.

Illustration.

The directors of a railway agreed with T., the owner of land required for a proposed extension of their railway, to pay to him, within three calendar months after the passing of the Bill, the sum of 2,000*l.* as and for a *personal* compensation to him for the annoyance, inconvenience, disturbance, damage, loss, and injury which he had sustained or might or would sustain in respect of the sporting and preservation of game upon his estate, through which the proposed line would pass :—*Held*, that this agreement was binding upon the company : *Taylor v. Chichester and Midhurst Ry.* (1870), 39 L. J. Ex. 217. "It does not appear to me that it makes the least difference that this third head has reference to

compensation for damage which it is said will never be done if the land is not taken. The argument applies just as much to the question of damage as to the question of land. In all matters relating to contract with a landowner and taking land from a landowner, there are two distinct questions which are distinctly provided for by the Lands Clauses Act and the Railways Clauses Act, viz., there is the taking of the land which has to be paid for, and there is the separate assessment of the damage which is to be done by the taking of the land. . . . But, my lords, I need not dwell upon the plain and obvious reasoning which is consonant in every way with good sense with regard to contracts. Nobody ever heard of a contract being a one-sided one, to be performed in the event of the purchaser of the land having the money, and to be abandoned if the purchaser thinks it will not suit his purpose; to be considered at an end as regards the vendor because the purchaser has changed his mind and does not wish to complete his contract. If authority were wanted, we have the strongest conceivable authority in the decision of your lordships' House in the case of the *Eastern Counties Ry. v. Hawkes* (p. 32, *supra*)": *per* Lord Hatherley, C., at p. 222, and see *ante*, p. 35, and *supra*, p. 56.

- (l) Municipalities entrusted with statutory powers for effecting town improvements are not subject to the same restrictions as railway and other companies of the like nature, and therefore they may as a general rule take all the land scheduled in their Act although it may not strictly be required for the purpose of the particular improvements contemplated.

Illustrations.

(1) A public body entrusted by the Legislature to construct a public work for the public advantage, and with no profit to themselves, was authorised to take compulsorily more land than was required for the purpose of effecting the improvements specified in their Act, with certain powers of disposing of superfluous lands:—*Held*, that they were entitled to take the whole of the lands scheduled in their Act, even though with the avowed object of selling a portion of such lands to a railway company; one of the purposes of their Act being to obtain money for the improvements. *Held also*, that they were not incapacitated from taking the whole of the lands comprised in the schedule, although, before they obtained power to take land, they had contracted conditionally upon their obtaining such power to sell the lands for a certain sum: *Galloway v. London Corporation* (1866), L. R. 1 H. L. 34.

(2) The corporation of B., under a Provisional Order Confirmation Act authorising them to widen, alter, and improve streets, served notices to treat in respect of certain scheduled lands and houses including more than was actually required for the purposes of widening the street:—*Held*, that as the corporation required the property for the improvement of the town and the making of a street which when made yields no profit, they were entitled to take the other neighbouring lands and houses described in the deposited plan, and that they were not confined like adventurers who can repay themselves out of tolls levied on their undertaking: *Quinton v. Bristol Corporation* (1874), L. R. 17 Eq. 524.

(3) By a special Act a corporation had power to enter upon, take and use, all or any part of the lands shown on the deposited plans and described in the deposited book of reference, that was to say (*inter alia*) for the purpose of the street works the lands shown on the deposited plans in connection therewith, and which they might require for the purposes thereof respectively. The term "street works" was defined to mean the new

streets, street extensions, street widenings, and tunnel or subway and works connected therewith respectively by the Act authorised. The corporation had power to deviate within certain limits, and also to take part of a house without taking the whole, and to retain and use or sell surplus lands. The corporation gave the plaintiff notice to take the whole of a piece of land with a building upon it, owned by her, for the purpose of widening a street authorised to be widened. A part only of the land to which the notice referred was to be thrown into the street, the corporation intending to sell the rest of the property to recoup their expenses:—*Held*, that the corporation had no power to take lands, even if shown on the deposited plans and described in the deposited book of reference, merely for the purpose of reselling them at a profit; and that therefore they were not entitled to acquire any part of the plaintiff's property not actually required for widening the street in question: *Donaldson v. South Shields Corporation* (1899), 79 L. T. 685.

NOTE.—This case seems inconsistent with the decision of the House of Lords in *Galloway v. London Corporation* (*ante*), but it was expressly pointed out by the Court that this case depended upon the construction of certain clauses of the special Act.

V. Period for which an agreement continues to be operative.

If under an agreement a railway company may take any further land they require belonging to the owner at a fixed price, they may exercise their right at any time before the expiration of the time limited for the completion of the undertaking.

Illustrations.

(1) The plaintiff agreed with the defendant company to sell to them certain lands at a fixed price, and being a limited owner he appointed his surveyor to value under sect. 9. The company refused to appoint a surveyor, or to complete, claiming a right to complete at any time before their powers expired:—*Held*, on an application for specific performance, that the company could not take advantage of their own neglect to comply with the requirements of the Act, and that they must complete within a reasonable time, and the Court granted specific performance subject to an inquiry as to title, and as to whether the price fixed was adequate: *Baker v. Metropolitan Ry.* (1863), 31 Beav. 504.

(2) The defendant railway company had agreed with the plaintiff for the purchase of certain lands, and also that if they should require additional land for the purpose of their railway and works they should pay for it at the rate of 200*l.* per acre. After their compulsory powers had expired, but before the date fixed for the completion of the railway had arrived, they entered without payment and without notice upon certain further land of the plaintiff for the purpose of diverting a path:—*Held*, that they were entitled to acquire such land as they required at any time before the date fixed for completion, but that they were not authorised to enter on the land without paying or depositing the purchase-money: *Rangeley v. Midland Ry.* (1868), L. R. 3 Ch. 306.

(3) The W. Railway Co. under their special Act had power to take lands compulsorily. By sect. 29 of the Act these compulsory powers were to cease "after the expiration of three years from the passing of this Act." The Act received the Royal assent on August 9th, 1899. On August 9th, 1902, the company gave G. notice to treat:—*Held*, that the day of the passing of the Act must be excluded in computing the three years, and that the notice was in time: *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 K. B. 1.

VI. Supersession or abandonment of the contract by the company.

(a) If, after having made an agreement with an owner, a company avails itself of its compulsory powers, the agreement may be considered to have been superseded or abandoned (*see* p. 159, *post*).

Illustrations.

(1) "The plaintiffs should have filed their bill at once upon the agreement, in which case they would have lost the privilege of entering under the 85th section [of the Lands Clauses Act], and must have applied to the Court to do what was right in respect of the possession of the land. They might have told the Court that they were ready to complete the agreement and desired the acreage to be ascertained, and might have asked to be let into possession upon such terms with respect to payment of money into court or otherwise as the Court should think fit. Here they have proceeded both under the compulsory clauses and by bill. The service of the notice and the entry into possession under the 85th section implied that no agreement existed; and though I have little doubt that the service of the notice was a slip, still, as the plaintiffs have taken the benefit of the 85th section, to which they were not entitled if a binding agreement subsisted between them and the defendant, I am compelled to dismiss the bill; but having regard to the absence of any due notice by the defendant that he intended to repudiate the agreement in consequence of the alteration in the line, and to the nature of the objections on which he has relied, it must be without costs": *per* Wood, V.-C. (Lord Hatherley), in *Bedford and Cambridge Ry. v. Stanley* (1862), 2 J. & H. at p. 763; *see post*, p. 55.

(2) By an agreement entered into in September, 1863, between the owners of certain lands and a railway company, under which the company purchased a certain part of the lands, it was agreed that if the company should require any additional land for any purpose, they should pay for the same at a fixed rate. In May, 1865, the company served the owners of the lands with a notice to treat, under the Lands Clauses Act, for the purchase of more land from them. Two years later the company entered into possession of the lands:—*Held*, that the notice to treat had superseded the agreement and that the value of the lands must be ascertained in the manner provided by the Lands Clauses Act: *Kemp v. South-Eastern Ry.* (1872), 25 L. T. 622. "It is quite clear that the company do not want it [the additional land]. If they do want it, then they have not taken the right mode of acquiring it; but, relying as they do solely upon the agreement, assuming that that gives them a right to the possession of this land, they paying the price of 100*l.* an acre, I say that if that were so under the agreement, which I do not admit to be so, that *by serving the notice to treat they wholly waived and departed from the agreement*; they have changed their position, their rights and interests, and the position, rights, and interests of the parties to whom they were opposed. The position was taken and acquiesced in on the ground that the notice which had been served cannot be referred to the position intended to be taken under the agreement": *per* Bacon, V.-C., in *Kemp v. South-Eastern Ry.* (1871), 25 L. T. at p. 625.

(b) This rule will not, however, be applied to a case where the object in serving the notice to treat was simply to ascertain the amount of compensation due.

Illustration.

A public authority, being desirous of acquiring a portion of the plaintiff company's wharf, without taking the whole, agreed with the company to take such part and

pay whatever compensation should be determined by arbitration. The Board afterwards, with the sole object of ascertaining the amount of compensation, gave the company notice to treat, in the ordinary form, for the part of the wharf required. The company served the Board with a counter-notice requiring the whole wharf to be taken, whereupon the Board served notices withdrawing the notice to treat, and requiring the company to proceed to arbitration under the agreement. They then appointed their arbitrator and required the company to appoint theirs, in default whereof they would proceed with the reference. The company then brought an action to restrain the Board from taking any proceedings under their notices and from taking any steps to obtain possession :—*Held*, that there had been no waiver of agreement by the Board : *South Devon Shipping Co. v. Metropolitan Board of Works* [1876] W. N. 167.

VII. Effect of purchase by agreement.

(a) If a superior lease is acquired, the company will not be liable to the lessee on the covenant for quiet enjoyment and to make compensation for the breach of it, unless they have exceeded their powers.

Illustration.

The M. Railway Co. under a special Act passed in 1893 had power to acquire lands compulsorily. In 1894 F. let property to A. for a term with a covenant for quiet enjoyment ; in 1895 the company purchased by agreement F.'s interest in the property subject to A.'s lease. The company proceeded with their works and occasioned structural damage to A.'s house. The company sued A. for rent; he counter-claimed for breach of the covenant for quiet enjoyment :—*Held*, that the company were bound by the covenant, but that as they had not exceeded their statutory powers, nor had executed them negligently, the action could not be brought against them on the covenant, and that the remedy, if any, was compensation under the Lands Clauses Act : *Manchester, Sheffield and Lincolnshire Ry. v. Anderson*, [1898] 2 Ch. 394.

(b) An agreement to purchase lands at a price to include compensation for all damage sustained by the vendor by reason of the exercise of the company's statutory powers will not exempt the company from liability in respect of acts done by them not within their statutory powers.

Illustration.

The plaintiff had sold to the defendant company certain lands, and had agreed that the price should be compensation for all damage sustained by reason of the exercise of the powers contained in their Act upon the said lands. In an action against the company for stopping up a footpath, a watercourse, and a drain :—*Held*, that the agreement afforded no defence, as it referred to injuries other than those for which the action was brought : *Pilgrim v. Southampton and Dorchester Ry.* (1849), 7 C. B. 205.

(c) Where a lessee's interest is purchased the company can be compelled to take an assignment of his lease and to indemnify him against claims for rent, &c.

Illustration.

The M. Railway Co. had given notice to treat as to certain leasehold property of the plaintiff, the price had been fixed and paid, and the company had received possession.

The company refused to take an assignment of the lease and indemnify the plaintiff against claims for rent, &c. The Court compelled them to take an assignment and indemnify the plaintiff: *Harding v. Metropolitan Ry.* (1872), L. R. 7 Ch. 154.

(d) Vendor as trustee for the purchaser.

“From the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money; but the relationship which is thus created does not entail all the obligations of an ordinary trusteeship: *Wall v. Bright*, 1 J. & W. 501; *Rose v. Watson*, 10 H. L. C. 672. The vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest, if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsists, but subject to the paramount right of the vendor to protect his own interest as vendor of the property: *per* Lord Cairns, in *Shaw v. Foster*, L. R. 5 H. L. at p. 338. When the title has been accepted and the purchase-money paid, this paramount right of the vendor ceases, and the trusteeship subsists without any qualification; but, as from the date of the contract, the relationship is throughout that of trustee and *cestui que trust*. Thus, although the vendor can, in the absence of express stipulation, insist on retaining the property until the completion of the purchase, it would, before the passing of the Conveyancing Act, 1881, have passed under his devise of trust estates; and he may be responsible as a trustee if, pending completion, he allow the property to go out of cultivation or to become deteriorated”: Dart, V. & P., 6th ed., p. 283; and see *Dodson v. Downey*, [1901] 2 Ch. 620; *Plews v. Samuel*, [1904] 1 Ch. 464.

Illustration.

“There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of the purchase-money, he pays a part of it, it would seem to follow as a necessary corollary that, to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him—in other words, that he acquires a lien, exactly in the same way as if, upon payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent”: *per* Lord Cranworth in *Rose v. Watson* (1864), 10 H. L. C. at p. 683.

(e) Where after a contract has been entered into for the sale of lands they are so devised by the owner that the legal estate cannot be conveyed without the intervention of the Court, the purchasing company will not be liable to pay the costs of the suit.

Illustration.

A railway company gave notice to B, to take certain land of which he was owner in fee simple, and in due course he was awarded compensation. B's title was approved, but before he could execute the conveyance he died, having by his will devised his lands to his children, some of whom were infants. The company then filed a bill for specific performance :—*Held*, that this course was justifiable, and the company was not liable to pay the costs of the suit : *London and South-Western Ry. v. Bridger* (1864), 10 Jur. (N.S.) 650.

(f) An agreement for sale and purchase will not be construed as including damage for severance with respect to the land not sold unless it is so expressly provided.

Illustration.

By an agreement between the plaintiffs and the agent of a railway company the former agreed to sell to the company a portion of a field for 229*l.*, being 120*l.* for the land and 109*l.* as compensation for damage by severance to the remaining portion. The agreement contained a stipulation that in case additional land should be wanted by the company the same should be taken and paid for after the same rate per acre. The company subsequently took possession of a second portion of the field, and entered upon same without having previously paid for it after the rate specified in the agreement, and without having agreed upon or ascertained by reference to a jury the damage occasioned by the severance of the second portion from the remaining portion of the field. A bill for an injunction having been filed :—*Held*, that the agreement only provided for the amount to be paid to the plaintiffs for the value of the second portion of the field, and that neither by intention nor legal construction did such value include the amount of damage by severance to the remaining portion of the field, which amount was either to be agreed upon or ascertained by a jury, and that until such amount was agreed or ascertained the company were not entitled to enter upon the second portion : *Jones v. Great Western Ry.* (1840), 1 Rail. Cas. 684.

(g) Where the parties agree to sell and purchase according to the valuation of two persons, one to be chosen by each party, or of an umpire, selected by the persons so chosen, the Court cannot enforce the agreement by appointing a person to make the valuation, as until the price is fixed in the mode provided by the parties there is no existing contract.

Illustrations.

(1) Where the parties agreed to sell and buy according to the valuation of two persons, one chosen by each party, or of an umpire, to be chosen by these two in the event of their not agreeing, a bill for specific performance, praying that the Court would appoint a person to make the valuation, or otherwise ascertain it, was dismissed : *Milnes v. Gery* (1807), 14 Ves. 400 ; 9 R. R. 307.

(2) A. and B., who were partners, agreed that B. could retire by giving a certain notice, and that A. should have the option of purchasing B.'s interest, which was to be valued by two valuers, one to be named by each partner, or by the umpire of the two valuers. B. gave notice of his intention to retire, and A. gave notice that he intended to exercise his power of purchasing B.'s interest. Two valuers were appointed, but after the appointment

B. refused to allow his valuer to proceed with the valuation :—*Held*, that there was no contract between the parties which the Court could specifically enforce : *Vickers v. Vickers* (1867), L. R. 4 Eq. 529. “The Courts have decided, and we must take it to be positive law, that there is no existing contract until this valuation has taken place, and therefore there is nothing for arbitrators who may be appointed by the Court to arbitrate upon. They have no authority ; no stranger can be invoked. The only persons who can act are two persons to be named, or two persons to be selected by others ; they are to act when the time arrives ; if they never come into existence the contract does not exist. That is the principle on which the cases have been decided, and which I am obliged to follow : ” *per* Wood, V.-C., at p. 536, *ib.*

VIII. Enforcing agreement to purchase.

(a) Specific performance will lie where the price has been fixed, the contract is complete, and the time for completion has arrived.

Illustrations.

(1) The defendant in 1799 verbally agreed to give the plaintiff a lease for twenty-one years of certain lands, at a rent to be fixed by arbitration. The plaintiff took possession, and farmed the land for eight years, when the defendant repudiated the agreement. An inquiry was ordered as to what was a fair rent of the lands in 1799, and specific performance was granted : *Gregory v. Mighell* (1811), 18 Ves. 328 ; 11 R. R. 207.

(2) The plaintiff being about to oppose the defendants' railway Bill in Parliament, the defendants made an agreement with him, whereby he was to withdraw his opposition and the defendants would purchase as much land as they should require for the railway at a fixed price, and construct and maintain a neat archway of stated dimensions wherever, upon his land, the plaintiff should think most convenient. The defendants failed to perform their agreement as to this archway :—*Held*, that the plaintiff was entitled to specific performance of the agreement : *Storer v. Great Western Ry.* (1842), 2 Y. & C. C. C. 48.

(3) A person received notice from a railway company of their intention, in the exercise of their statutory powers, to purchase his lands :—*Held*, that he could maintain specific performance of the agreement thereby created, and that the Court would enforce such agreement by ordering the company to take the proceedings prescribed by the statute for ascertaining the amount of the purchase-money and compensation : *Walker v. Eastern Counties Ry.* (1848), 6 Hare, 594.

(4) A railway company agreed with a landowner for the purchase from him of certain lands. The price was fixed, and also the price at which the company could acquire further lands if they required them. The company agreed to pay interest from the date of their commencing work upon any part of the lands in question. The company not having begun their works upon any part of the lands, and not having completed the purchase two years after the agreement, the owner applied for specific performance :—*Held*, that the time for completion had not arrived, and specific performance was refused, the agreement providing for an event which had not yet happened : *Bodington v. Great Western Ry.* (1849), 13 Jur. 144.

(5) The C. Railway Co. were authorised by an Act of 1845 to purchase lands. S. agreed in writing with the company to convey to them certain lands, subject to the making of such roadways and slips for cattle as might be necessary. The land was conveyed, and the company entered and made their railway. Disputes arose as to the adequacy of the

roads, &c. S. filed a bill in equity for specific performance :—*Held*, that there was nothing to take away the Court's original jurisdiction to see that the easements contracted for were secured to the vendor ; and that the Railways Clauses Act contained no distinct provisions regulating the mode in which private contracts entered into by companies were to be carried out, and therefore that a decree for specific performance was the appropriate remedy ; and that the case should be referred to a master to report whether the accommodation works were sufficient : *Sanderson v. Cockermouth and Workington Ry.* (1850), 19 L. J. Ch. 503.

(6) Lessees of premises, occupied as a ropery, agreed to withdraw their opposition to a Bill in Parliament for a railway which would intersect the property. The agreement (*inter alia*) stipulated that the railway should be so constructed that, when finished, the level of the ropery should not be altered, nor the surface of the ropery be in the least respect diminished :—*Held*, that the railway company were bound to restore the surface so as to be available for all purposes to which it might have been applied before the construction of the railway, and not for the purposes of a ropery only : *Harby v. East and West India Docks and Birmingham Junction Ry.* (1851), 1 De G. M. & G. 290.

(7) The defendant company had given the plaintiff notice to treat for certain lands. The price had subsequently been fixed by agreement, but the company refused to complete :—*Held*, that the notice to treat followed by an agreement as to the price amounted to a complete contract, of which the Court would enforce specific performance : *Inge v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 3 De G. M. & G. 658.

(8) The plaintiff, who had an annuity charged upon certain leasehold property, was served with notice to treat by a railway company, by whom a conveyance of the property was afterwards taken from a prior mortgagee who had a power of sale. The plaintiff filed his bill, alleging a contract to purchase, and asking for specific performance :—*Held*, by Kindersley, V.-C., dissenting from *Walker v. Eastern Counties Ry.*, 6 Hare, 594, that such a bill could not be maintained : *Hill v. Great Northern Ry.* (1854), 24 L. J. Ch. 212.

NOTE.—In the Court of Appeal (5 De G. M. & G. 66) it was pointed out by the Lords Justices that the bill in this case was not for specific performance, although it had been treated as such before and by the Vice-Chancellor. Lord Justice Knight-Bruce gave no opinion upon the decree upon the hypothesis of the bill having been such as was supposed.

(9) W. P. agreed with a railway company to sell to them certain land required by them for the price of 3,750*l.* which was to include all damages by severance, and all works which P. might be entitled, under the Lands and Railways Clauses Acts, to call upon the company to execute, and it was provided that the company should build two bridges of stated dimensions, and also construct "a road upon the level as at present, where the said W. P. now passes to and from his brick kilns." A conveyance to the company was afterwards executed by W. P., which contained no covenants or provisions as to the bridges or road. W. P. died, the plaintiff being the heir-at-law of his devisee. The line of railway had been in course of construction for some years, and the company had lately begun to construct the road at a level some feet lower than the original. This was alleged to be exceedingly injurious to the plaintiff's property, and he sought an injunction to restrain the company from proceeding with the work :—*Held*, that the silence of the conveyance as to the road or the bridges did not in any way subtract from the rights of the plaintiff, and that an abandonment of the agreement could in no way be inferred from the circumstance : *Foster v. Birmingham, Wolverhampton and Dudley Ry.* (1854), 2 W. R. 378.

(10) A railway company agreed with a landowner to construct a siding connected with their railway, "together with all necessary approaches thereto for public use, for the reception of goods and other matters and things." The company refused to comply strictly with

this undertaking, and the owner filed a bill for specific performance. A decree was granted for the construction of the siding, including all necessary and proper approaches : *Lytton v. Great Northern Ry.* (1856), 2 K. & J. 394.

(11) The defendant owned certain land which the plaintiff company needed, and he had obtained the insertion in their Act of a clause compelling them, if they took this land, to take also certain other land owned by him. The company had given notice to treat as to the whole, and the price had been determined. It was *held* that, notwithstanding the provisions of the Act enabling them to get possession, the Court would grant the company specific performance : *Regent's Canal v. Ware* (1857), 23 Beav. 575.

(12) Before applying for their Act the promoters of a railway agreed, through their agent, with the owners of land which would be required, for the purchase of such land at the rate of thirty years purchase upon the annual rental, if the Act could be obtained in the sessions of 1859 or 1860. The Bill was lost in the first session, but passed in the later, after an alteration in the course of the line :—*Held*, that the agreement was binding on the landowners, and that specific performance ought to be decreed notwithstanding the variation and the objections raised as to vagueness, want of consideration, &c. : *Bedford and Cambridge Ry. v. Stanley* (1862), 2 J. & H. 746 ; see *ante*, p. 49.

(13) A railway company took possession, under sect. 85 of the Lands Clauses Act, of land belonging to B., and paid the estimated value (280*l.*) into court. The purchase money was afterwards agreed at 346*l.* The railway was made over the land, but the company failed to pay the money. B. brought an action for specific performance and to have the 280*l.* applied towards payment of the purchase-money and the balance raised by a sale of the land. A decree was made for specific performance and for payment of the balance, but an order for sale of the land was refused : *Betty v. London, Chatham and Dover Ry.* [1867] W. N. 169.

(14) The F. Railway Co. by their Act were under obligation to construct certain works in a particular manner, subject to a waiver by the Admiralty. In consideration of the plaintiffs procuring the waiver and the conveyance of land for the purpose the company agreed to execute certain works for the accommodation of the plaintiffs and the public. The waiver was obtained, and the land conveyed, but the company only partially executed the accommodation works. The plaintiffs filed a bill for specific performance :—*Held*, (1) that as the company had been released from an onerous obligation, and had had the land conveyed to them, there must be specific performance ; (2) that the agreement was not *ultra vires* ; (3) that the Attorney-General was not a necessary party to a suit for specific performance of an agreement made by individuals for their own benefit which would afterwards enure to the public : *Wilson v. Furness Ry.* (1869), L. R. 9 Eq. 28.

(15) A railway company having taken possession of land for their railway without the owner's consent, an agreement was made for a certain sum to be paid upon a given day. The money was not paid, and the railway was completed, and working. The landowner filed a bill for specific performance, and moved for payment upon a fixed date, or delivery up of the land :—*Held*, that a railway company was in the same position as an individual, and that the money must be paid within six months or the land delivered up : *Sutton v. Hoylake Ry.* (1869), 20 L. T. 214.

(16) G., whose land had been taken by a railway company for the purposes of their undertaking, obtained a decree for specific performance against the company. An Act was then passed, which provided that no proceedings against the company should be continued or begun during the period of five years without the leave of the Court of Chancery. On a motion by G. for leave to prosecute his decree :—*Held*, that he must have leave to do so unless the amount due to him was paid by a given day : *Griffith v. Cambrian Ry.* (1869), 21 L. T. 290.

(17) T. agreed to sell land to a company, subject to a stipulation that he should have a right of access to a road the company proposed to make on the land. The agreement was executed by the secretary of the company, but was not under seal. Subsequently T. conveyed the land absolutely to the company. The conveyance did not reserve the right of access :—*Held*, that the right of access stipulated for in the agreement was extinguished by the conveyance : *Teebay v. Manchester, Sheffield and Lincolnshire Ry.* (1883), 24 Ch. D. 572 ; see Illustration (9), *ante*.

(b) Specific performance will not be granted unless the owner have made a title.

Illustrations.

(1) Where a party had contracted to purchase, and had been eight years in possession of premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or to accept such title as the vendor could give, having paid no part of the purchase-money and no rent, the Court, upon a bill filed by the vendor for relief, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit : *King v. King* (1833), 1 Myl. & K. 442 ; 36 R. R. 349.

(2) C. sold land to the N. Railway Co. by private agreement. The company paid part of the purchase-money, but refused to pay the balance until C. should make a good title to the land. C. claimed that the balance should be paid into court or that the company should be restrained from retaining possession :—*Held*, that the Court would not give this relief : *Capps v. Norwich and Spalding Ry.* (1863), 9 Jur. (N.S.) 635.

(3) The defendant company had agreed to purchase certain lands from the plaintiff. They had made no requisitions as to the plaintiff's abstract of title. The plaintiff instituted a suit for specific performance, and the company then made various requisitions :—*Held*, that, no title having been made, specific performance could not be decreed, but it was sent to the master to see whether a title could be made : *Gunston v. East Gloucestershire Ry.* (1868), 18 L. T. 8.

NOTE.—The mere taking of possession and making slight alterations in the property is not of necessity an acceptance of the title : *per Romilly, M.R.*, in *Turquand v. Rhodes* (1868), 18 L. T. 844.

(c) A company cannot set up as a defence a landowner's inability to grant a good title if such inability arises from their neglect to carry out the agreement with him.

Illustration.

The directors of a railway company were applying to Parliament for powers to make a branch line and a divergent line. The plaintiff was opposing their Bill, but withdrew his opposition in consideration of their agreeing to buy at a fixed price certain land which they would require and to pay a further sum as compensation. Of some of the land he was tenant for life, and the company agreed to obtain power for him to sell. The Bill passed, but the company only obtained powers to make the branch line. This also they ultimately abandoned, and they gave notice to the plaintiff that they did not require his land. He filed a bill for specific performance :—*Held*, that the company could not set up as a defence his alleged inability to grant a good title, they having neglected to obtain the means for him to make a title : *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. Cas. 331.

(d) Specific performance will not be granted when the plaintiff has an adequate remedy in damages.

Illustrations.

(1) A railway company promoted a Bill for the construction of a certain railway, which was opposed by one of the landowners interested. He afterwards withdrew his opposition on the faith of an agreement which provided for the formation of a branch line to his ironworks. The company obtained powers for this purpose, but afterwards abandoned their intention of making the branch line, and were about to apply for powers, enabling them to do this, when the plaintiff filed his bill for an injunction to restrain them from doing so. *Shadwell, V.-C.*, granted the injunction, but Lord Cottenham, C., dissolved it, holding that a contract to make a railway is not one of which the Court will order specific performance, but will leave the parties to their legal remedies : *Heathcote v. North Staffordshire Ry.* (1850), 6 Rail. Cas. 358.

(2) A railway company agreed under seal, in pursuance of their powers, to purchase at a fixed price certain land for the purposes of their proposed railway, and to pay a large sum as compensation. The railway was abandoned, and the company refused to carry out the agreement. The vendor filed a bill for specific performance :—*Held* that, the plaintiff having an adequate remedy at law, no injunction would be granted : *Webb v. Direct London and Portsmouth Ry.* (1852), 1 De G. M. & G. 521.

(3) A railway company had agreed with the plaintiff to pay a fixed price for any land taken from him. They had taken certain land and paid for it, and built the railway. Some years after he alleged that they should have taken and paid for the portions of road on his lands over which the railway passed :—*Held* that, even if such were the true construction of the agreement, the plaintiff could not obtain specific performance, his remedy at law being adequate : *Ingram v. Midland Ry.* (1861), 3 L. T. 533.

(e) Specific performance will not be granted if an essential part of the agreement is vague.

Illustrations.

(1) A railway company agreed with an opposing landowner to purchase of him "the land required" at 400*l.* an acre, in one set of parcels; other sums for the "land required" in other sets of parcels, and 1,000*l.* for depreciation of homesteads. The company's Bill passed in July, 1847. It limited the time for completing the line to five years from that date. In September, 1847, the landowner's solicitors sent to the company a draft of a proposed agreement more detailed and precise, but failed to get this agreement executed by the company. On January 30th, 1849, the landowner's solicitors intimated that unless the company were ready to execute an absolute agreement proceedings would be taken forthwith to compel the formation of the line. In February, 1849, the company expressed their intention to abide by the alterations they had made in the draft contract, and to accept service of any process. In July, 1850, the landowner filed a bill for specific performance :—*Held*, that the agreement was not definite enough to be enforceable, and that there had been *laches* on the part of the landowner : *Stuart v. London and North-Western Ry.* (1852), 1 De G. M. & G. 721.

(2) The South-Western Railway Co. were desirous to acquire, under the powers contained in their Act, certain settled lands held by trustees to such uses as A. and his son should appoint. A. and his son agreed with the company that the latter should take possession on depositing a sum of money on account, and that the price should be fixed by arbitration or a jury, as A. should choose. A. died before any appointment of an arbitrator or jury took place :—*Held*, that this was not a contract which the Court could

enforce or aid in carrying into effect as a defective execution of the power of appointment: *Morgan v. Milman* (1853), 3 De G. M. & G. 24.

(3) The defendant company were desirous of improving the southern approach to their bridge, and they agreed with the plaintiffs the price at which they were to take certain land (under their powers) for the proposed new street. The plaintiffs were to consult the company as to any new houses to be erected facing the proposed street, and any differences on this point were to be settled by parties named. The company refused to complete, and the plaintiffs filed a bill:—*Held*, that the clause as to the new houses was an essential part of the agreement, and was vague, and not a matter as to which specific performance could be granted: *Tillett v. Charing Cross Bridge* (1859), 26 Beav. 419.

(f) Specific performance will not be granted where the price to be paid is by the agreement left to be determined by arbitration.

Illustration.

An agreement provided for the sale of leasehold premises and the goodwill of a trade and certain fixtures to be taken at a valuation, to be made by two gaugers to be named, or their umpire:—*Held*, that the specific performance of such an agreement, where one part was left to be determined by arbitration, could not be decreed: *Darbey v. Whitaker*, (1857), 4 Drew. 134.

(g) Where land is being acquired by purchase under an agreement with a person who is (or claims to be) absolute owner, it is obligatory upon the purchasing company to pay the purchase-money and execute the agreement before taking possession. If they desire immediate possession, they must proceed under sects. 76 and 85 of the Lands Clauses Act.

Illustration.

The defendants had agreed with the plaintiff to purchase certain leasehold property for the purposes of a street improvement. They discovered that the plaintiff's lessor had an option to terminate during the lease, and they claimed an abatement of the price. The plaintiff brought an action for specific performance, and the defendants applied to the Court for possession on paying the sum agreed upon into court to await the issue:—*Held* that, as they had not followed the procedure for obtaining immediate possession, there was no jurisdiction in the Court to give it them: *Bygrave v. Metropolitan Board of Works* (1886), 32 Ch. D. 147.

(h) If a company enters into a contract with a person who himself has entered into a contract for the purchase of land, but who has lost his right in equity to specific performance against the vendor, the Court will not grant specific performance at the suit of the company.

Illustration.

A railway company having agreed with K. (who, under an agreement made some years before, was the purchaser of the land required, but who had not paid the purchase-money and appeared to have abandoned, some time before, the possession of the land), filed a bill

for specific performance against both D., the vendor, and K., the purchaser :—*Held*, that as K. was not, after such a lapse of time and in the circumstances, entitled in equity to a decree for specific performance of the contract against D., the bill must be dismissed as against D., with costs ; and as against K., without costs : *South-Eastern Ry. v. Knott*, (1852), 10 Hare, 122. “The rights of parties to agreements to enforce specific performance are not co-extensive, for their respective rights depend upon their conduct, and the conduct of one may give him the right to specific performance, while the conduct of the other may lose him that right” : *per* Turner, V.-C., at p. 125.

NOTE.—See Fry on Specific Perf., 3rd ed., p. 217.

(i) Specific performance will not be granted when the agreement set up is expressly or impliedly conditional.

Illustrations.

(1) A railway company were applying for an Act authorising a proposed line. They agreed with the plaintiff that in the event of the Act being obtained they would make certain payments to him for purchase-money and compensation “before entering upon” his land. The Act was obtained, but the line was not made, and no land was required or entered upon. The plaintiff claimed the sums in the agreement mentioned :—*Held*, that the agreement was conditional upon the land being required : *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457.

(2) The plaintiff opposed an application to Parliament by the promoters of the defendant railway company. He withdrew his opposition in consideration of an agreement by the promoters—(i.) that the company should on obtaining their Act pay him 1,000*l.* for the lands required for the railway and 4,000*l.* compensation ; (ii.) that a certain tunnel should be made through his lands so as not to damage a wood ; (iii.) that the tunnel should be extended to a certain point ; and (iv.) that a railway station should be built at a fixed spot. The company obtained their Act, but subsequently the line was abandoned. The plaintiff filed a bill for specific performance :—*Held*, that clauses 2, 3, and 4 must clearly be conditional on the line being constructed, and that the whole agreement must be construed in the same way : *Preston v. Liverpool, Manchester and Newcastle-upon-Tyne Ry.* (1856), 5 H. L. Cas. 605.

(k) A railway company who have taken possession of land under an agreement but delay to complete will, in an action against them for specific performance, be required to pay the purchase-money into court before answer, or give up possession.

Illustrations.

(1) Where a railway company contracted for the purchase of land and, pending the negotiation, entered into possession, but afterwards delayed to complete, the Court, on motion, in an action for specific performance, ordered the purchase-money to be paid into court before answer : *Griffiths v. Crystal Palace and South London Junction Ry.* (1866), 14 L. T. 753.

(2) C. sold land to the L. Railway Co., on condition that the company should have possession, and should pay the purchase-money in two years with interest, and that C. should retain his lien for unpaid purchase-money. The company took possession, but at the end of two years paid only part of the purchase-money. C. filed a bill for specific performance, and before answer moved that the balance should be paid into court, or the land delivered up :—*Held*, that C. was entitled to this relief, but that if the land was

delivered up he must pay that part of purchase-money received by him into court : *Cooper v. London, Chatham and Dover Ry.* (1866), 14 W. R. 985.

(3) P. had leased certain houses to lessees, who had sublet them to weekly tenants. The G. E. Railway Co. bought the property from P. by agreement, and entered into possession. The company turned the weekly tenants out of possession ; on this strangers made a forcible entry and seriously damaged the property. P. filed a bill praying specific performance, payment of consequential damages and of the purchase-money into court :—*Held*, that as the deterioration, which rendered the property a less sufficient security for the purchase-money, was due to the company entering and turning the weekly tenants out, the company were not entitled to the option of paying into court or delivering up possession, but must pay the purchase-money into court : *Pope v. Great Eastern Ry.* (1866), L. R. 3 Eq. 171.

(4) A purchaser was allowed the option of paying the balance of the purchase-money into court or of giving up possession : *Greenwood v. Turner*, [1891] 2 Ch. 144.

(l) Delay in bringing an action is a ground for refusing specific performance.

Illustrations.

(1) A contract for the sale of the vendor's interest in a manor under a lease for lives was made on October 16th, 1840. Objections were taken to the title, and on August 20th, 1841, the purchaser gave notice to the vendors that, the title being defective, he rescinded the contract. The purchaser's solicitor claimed his right to insist upon the notice, but gave the vendors two months more in which to complete the title. On January 17th, 1842, the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on August 30th, 1843 :—*Held*, that the interval between August 20th, 1841, and January 17th, 1842, ought not to be regarded, in the question of *laches*, but that the delay, after January 17th, 1842, before the bill was filed, precluded the vendors from sustaining their suit for specific performance : *Southcomb v. Bishop of Exeter* (1847), 6 Hare, 213.

(2) A railway company, in 1862, agreed with P. and L. for the purchase of certain land required, the price to be fixed by arbitration in the manner provided by the Lands Clauses Act, and to be payable on completion, with interest. The company was to be at liberty to take possession upon paying certain sums into a bank. These deposits were duly made and possession taken by the company, who constructed their railway on the land. The title was accepted and draft conveyances approved. The company, however, delayed completing the purchase, and excused themselves on the ground of want of funds. In 1867 bills were filed for specific performance. The Court refused, upon motion, to order the balance of the purchase-money to be paid into court : *Lewes or Pryse v. Cambrian Ry.* (1867), 36 L. J. Ch. 565.

(3) By an agreement in 1851 J. agreed to sell to the defendants a piece of mud land near Baglan Bay at a certain rent-charge and royalties, the defendants undertaking to make and for ever maintain a public road in a certain direction. The defendants took possession before the Act was passed authorising the construction of the docks and branch railway projected. The road was never made, and in 1892 the plaintiff brought his action claiming specific performance of the covenant to make and maintain the public road, and a declaration that the plaintiff and the owner for the time being of the Briton Ferry Estate were entitled to lay and maintain a single or double tramway upon the said

road. The defendants pleaded extinction of the covenant alleged by a certain other covenant, and also *laches*: *Held*, that the plaintiff was entitled to the declaration and decree claimed: *Jersey (Earl) v. Great Western Ry.*, [1894] 3 Ch. 625, *n*.

(*m*) The company are entitled to relief if the vendor creates a new and adverse interest in the land after his agreement to sell.

Illustration.

W. having opposed a railway Bill in Parliament, the promoters agreed to pay him 5,000*l.*, and also compensation to tenants from year to year, but compensation to any other tenants was to be paid by W. One of these latter tenants claimed to have a valid agreement for a lease at the date of the above-mentioned agreement, but he allowed the company (after notice from them to settle with him as a yearly tenant and without making a larger claim) to take possession of the land and construct the railway. Afterwards he obtained a lease from W., including the land taken by the company; and the company also, on the same day as that on which the lease was granted, obtained a conveyance from W. of this part of the land required by them. It was alleged that this piece of land was included in the lease by mistake; but the tenant, having brought an action of ejectment against the company, and the landowner having died, and his executors refusing to compensate the tenant, and denying that he had a valid agreement for a lease, as alleged by him, the company filed a bill to have it ascertained whether they or the executors were liable to compensate the tenant, and to restrain the tenant from proceeding with the ejectment:—*Held*, that they were entitled to this relief; and a reference was directed to inquire whether the tenant had a valid agreement for a lease, as alleged: *Norfolk Ry. v. Bayes* (1849), 13 Jur. 435.

(*n*) Inconvenience to the public caused by stopping the execution of the works wrongly varied by the promoters is no defence to an action against them for specific performance.

Illustration.

R. was the owner of certain land, through part of which the T. V. Railway was intended to pass. By an agreement between R. and the promoters it was provided (*inter alia*) that a road to R.'s park lodge should be made and a bridge built over the line; that the company should purchase part of R.'s land; and that R. should withdraw his opposition to the Bill. The Bill passed, and, by a later agreement, the first agreement was varied, and the company undertook to make the road and bridge according to a plan annexed. The company, however, had altered the level of the railway, and begun to construct the road and bridge in a different manner and at a different level, alleging impossibility of construction according to the agreement. The company having refused to adhere to the plan, R. filed his bill for an injunction, and for performance of the agreement:—*Held*, that R. was entitled to specific performance of the agreement, and that the company could not set up inconvenience and loss to the public as grounds for not performing it: *Raphael v. Thames Valley Ry.* (1867), L. R. 2 Ch. 147.

IX. Payment of the purchase-money.

(*a*) The owner of the land may bring an action for specific performance and obtain an order for the payment of the purchase-money.

Illustrations.

(1) A burial board agreed to purchase parish lands on the terms of paying a yearly sum, the principal to be secured either on the land or as a charge on the church rate or poor rate. On petition to carry out this agreement :—*Held*, that the money must be paid into court in a lump sum, the dividends to be paid to the vendors until the money was invested in land, and the costs to be paid by the burial board : *In re Barrow* (1855), 3 W. R. 635.

(2) A railway company gave notice to treat for the purchase of a house. The price was fixed, and the company took possession. They examined and approved the plaintiff's title, but refused to pay the purchase-money. The plaintiff filed a bill for specific performance, and the company admitting by their answer the above facts, were ordered, on motion, to pay the purchase-money into court : *Chapple v. London, Chatham and Dover Ry.* (1865), 34 L. J. Ch. 597.

(3) A railway company took possession of land under an agreement to pay the amount afterwards determined by arbitration as the purchase-money on the final settlement of the purchase, with interest thereon in the meantime. A bill was filed for specific performance, and the title was accepted and the conveyance settled by both parties. The arbitrator duly made his award, which remained unimpeached, but it was alleged that the plaintiff had done or said something which possibly the arbitrator might have acted upon. Upon motion :—*Held*, that the purchase-money, with interest thereon at the rate stipulated, must be paid into court within a month from the service of the order : *South-Eastern Ry. v. London, Brighton and South Coast Ry.* (1866), 14 W. R. 666.

(4) The M. Railway Co. purchased land from W. by agreement. The M. Company agreed with the S. Company that the latter should work the line, and the S. Company entered into possession and opened the line. The purchase-money not having been paid. W. sued for specific performance ; for payment of the purchase-money and interest ; for an injunction restraining both companies from continuing in possession until the agreement was performed ; for a declaration of lien to be enforced by a sale ; for a receiver of the rents, &c., of the M. Company's estate ; and for damages :—*Held*, that as possession was sought, which would affect the S. Company, they were properly made parties ; that specific performance and payment into court should be decreed ; that W. was entitled to a declaration of lien as an unpaid vendor, and as against both companies ; and that in case the purchase-money was not paid W. should have liberty to apply for an injunction and for a receiver : *Winchester (Bishop of) v. Mid-Hants Ry.* (1867), L. R. 5 Eq. 17.

(5) The C. Railway Co. acquired land from H. under their compulsory powers. The land was valued under the Railways (Ireland) Act, 1851, but the award was not lodged with the clerk of the peace until a short time after the expiration of the company's compulsory powers. The company never, in fact, entered on the lands. After the power to execute works had expired, H. required from the company a certificate of the sum awarded. This was not furnished. H. then petitioned that the purchase-money should be lodged in the Bank of Ireland in accordance with the Railways (Ireland) Act, 1851 :—*Held*, that the whole transaction was complete before the constructing powers expired, and that H. had "rights and interests arising out of the provisions" of the Act of 1851 : *Cork and Youghal Ry. v. Harnett* (1871), L. R. 5 H. L. 111.

(6) The M. Board of Works, acting under an improvement Act, gave C., a tailor, notice to treat for the purchase of his leasehold. By agreement C. was to receive 150*l.* for his leasehold and 250*l.* for trade damage and expenses. C. was unable to make a title. The Board paid 100*l.* into court, executed a deed poll, and took possession. C. sued for specific performance :—*Held*, that C. was entitled to have the 250*l.* paid out to him, with interest, from the date of possession : *Cooper v Metropolitan Board of Works* (1883), 25 Ch. D. 472.

(7) In December, 1883, a railway company agreed to purchase certain land of B. The company had taken possession in November, 1883, and continued in possession without paying the purchase-money or any interest, except the first payment, which fell due in June, 1884. An action having been brought for specific performance and enforcement of the vendor's lien, the Court, upon motion before statement of claim, ordered the purchase-money and interest to be paid into court within three months: *Bond v. Hull and Barnsley Ry.* [1887] W. N. 88.

(b) The plaintiff (vendor) may bring his action for specific performance or for an injunction restraining the promoters from taking or continuing in possession.

Illustrations.

(1) The plaintiff, by his bill, sought specific performance of an agreement by the defendant to either purchase an estate or give up possession, which he held. Defendant admitted the agreement, but insisted that the plaintiff was an alien, and that he might make a good title by procuring an Act of naturalization. The plaintiff moved that the defendant might pay into court the purchase-money and interest:—*Held*, that the plaintiff might require the defendant to pay the purchase-money or give up possession: *Clarke v. Wilson* (1808), 15 Ves. Jun. 317; 10 R. R. 82.

(2) C. sold and conveyed to a railway company, partly under the latter's powers and partly by agreement, certain land for which part of the purchase-money was paid, a balance being left of 500*l*. The company constructed the railway over the land and afterwards leased it to the L. B. & S. C. Railway Co. The money remaining unpaid, C. filed his bill against both companies, asking for payment of the money or an injunction to restrain them from using the land. An order was made that the purchasing company should pay the money, and, in default, that both companies should be restrained from using C.'s land: *Cosens v. Bognor Ry.* (1866), L. R. 1 Ch. 594.

(3) P. agreed with a railway company for the sale to them of land, and it was stipulated (*inter alia*) that they should pay him 2,000*l*. as compensation, either in cash or in securities. At a later date the company gave P. their bond for 2,000*l*., and were then allowed to take possession. The company made default both in paying the amount so secured and in paying interest:—*Held*, that P. was not entitled to an injunction to restrain the company from continuing in possession until the purchase-money was paid: *Pell v. Northampton and Banbury Junction Ry.* (1866), L. R. 2 Ch. 100; *see p. 64, post*.

(4) An agreement having been made for the sale of certain land (which was subject to rent-charges), the railway company (purchasers) took possession and completed the line, but failed to pay the balance of the purchase-money and the rent-charges. A bill was filed and decree made for specific performance, and an injunction was granted after decree restraining the company from continuing in possession until payment of the purchase-money and arrears of rent-charges and costs: *Nelson (Lord) v. Salisbury and Dorset Junction Ry.* (1868), 16 W. R. 1074; *see p. 64, post*.

(c) An injunction at the instance of an unpaid vendor to restrain a railway company from remaining in possession of land and from running its trains over the same will only be granted in very exceptional cases, and is never granted on an interlocutory application. An order for the appointment of a receiver or for a sale of the land may, however, be made in such a case.

Illustrations.

(1) "If the company were destroying the property, the plaintiff might be entitled to an injunction; but he has let them into possession, and they are only using the land for the very purpose for which he sold it to them. The plaintiff may perhaps be entitled to a receiver, but I do not think that he is entitled to such an injunction as he asks": *per* Turner, L.J., in *Pell v. Northampton and Banbury Junction Ry.* (1866), L. R. 2 Ch. at p. 101. "It appears inconsistent in a suit for specific performance to apply to turn the purchaser out of possession. It would seem more proper to apply to have the money paid into court": *per* Cairns, L.J., at p. 102, *ib.*; see *ante*, p. 63.

(2) P. agreed to sell certain land to a railway company at a price to be fixed by arbitration and payable on completion, with interest at 4 per cent. from date of agreement. If, from any cause other than the vendor's default, the purchase was not completed within six months from the date of the agreement, the interest on the purchase-money was to be 5 per cent. The company were to be free to take possession upon making deposit of a sum of 1,380*l.* This deposit was made, and possession taken. The value was ascertained by arbitration and the conveyance of the land prepared, but the company, when pressed to complete more than three years after the date of the agreement, alleged inability from want of means:—*Held*, that P. was not entitled to an order on motion for payment of the balance of the purchase-money into court: *Pryse v. Cambrian Ry.* (1867), L. R. 2 Ch. 444. "The company are using the lands for the purpose for which they were sold. As for the delay, the parties have expressly provided for it, the contract containing an express stipulation that in the event of delay, not occasioned by the default of the vendor, an increased rate of interest is to be payable": *per* Turner, L.J., *ib.* at p. 446; see *ante*, p. 60.

(3) Where a railway company had agreed to purchase land of N. for 500*l.* and certain rent-charges, and made their railway over the land without having paid either purchase-money or rent-charges, a decree for specific performance was first granted, and afterwards, upon default in paying the purchase-money, arrears of rent-charges and the costs of the action, an injunction was granted restraining the company from continuing in possession if the money due was not paid within a fortnight: *Nelson (Earl) v. Salisbury and Dorset Junction Ry.* (1868), W. N. 180; see *ante*, p. 63.

(4) A railway company contracted to purchase lands from J., their chairman, and entered into possession. The company subsequently purchased other lands from J.'s devisees. None of the lands were paid for. In a suit for specific performance a decree was made fixing a day for payment. Some time after a motion was made for sale of the railway:—*Held*, that an order should be made that if the company did not pay within three months the railway should be sold: *Jersey (Earl) v. South Wales Mineral Ry.* (1868), 19 L. T. 446.

(5) A. sold land by agreement to the I. Railway Co. A. died and devised the land to M. The company entered into possession and made their railway. M. sued for specific performance and a declaration of lien, which he obtained. The company became insolvent. M. sued for sale of the land, payment of the deficiency, and for an injunction restraining the company from remaining in possession:—*Held*, that an injunction was not the appropriate remedy, as it would render the land useless to both parties, but that a receiver should be appointed with a direction to the company to let him into possession at once: *Munns v. Isle of Wight Ry.* (1870), L. R. 5 Ch. 414.

(6) K. sold land by agreement to the A. Railway Co. The company entered into possession and the railway was made and opened, but they never required a conveyance from K. nor did they pay the purchase-money. K. filed his bill for specific performance:—*Held*, that K. was entitled to specific performance and a declaration of lien enforceable by sale: *Keane v. Athenry and Ennis Ry.* (1870), 19 W. R. 43.

(7) On an application by an unpaid vendor, the Court declined to grant an injunction restraining the running of trains, but made an order for the sale of the land : *Lycett v. Stafford and Uttoxeter Ry.* (1872), L. R. 13 Eq. 261.

(8) "An interlocutory application to restrain a railway company from running their trains is monstrous": *per* James, L.J., in *Latimer v. Aylesbury and Buckingham Ry.* (1878), 9 Ch. D. 385. In the same case the Court refused to appoint a receiver on an interlocutory application.

(9) The defendants, acting under statutory powers, entered upon and took for the purposes of their railway certain land belonging to A. The purchase-money and compensation were agreed at 1,101*l.* A. afterwards brought an action claiming a declaration that he was entitled to a lien for the unpaid purchase-money and for interest and payment, or, in default, sale or foreclosure and possession. An order was made in this action for payment of purchase-money and interest by a date named, with a declaration of lien, and that in default of payment A. was to be at liberty to apply to enforce his lien. The order contained no order for sale :—*Held*, that the Court would, on default in payment, there being evidence that the land was unsaleable, grant an injunction to restrain the defendants from running trains over the railway and from continuing in possession of the land : *Allgood v. Merrybent and Darlington Ry.* (1886), 33 Ch. D. 571.

(d) The Lands Clauses Act has not taken away the lien on the land of a vendor for his unpaid purchase-money, whether possession has been taken by agreement or under the 85th section of the Lands Clauses Act. Such lien may be enforced by a sale of the land, and extends to compensation due to the owner for damage by severance and injury to his adjoining land.

Illustrations.

(1) W. entered into an agreement for the sale of an estate to M., at the price of 75*l.* an acre. It was also agreed that the purchase-money should be secured by the bond of M. to W., with interest at 4 per cent., and should remain so secured during the life of W., on the regular payment of such interest. The conveyance expressed that the whole of the purchase-money (1,485*l.*) had been paid, whereas, in fact, only 485*l.* had been paid. M. executed a bond in the penal sum of 2,000*l.*, conditioned to be void upon payment of 1,000*l.* within twelve months of the death of W., with interest at 4 per cent. in the meantime :—*Held*, that there was nothing to show that the vendor intended to rely wholly upon the personal credit of the purchaser, and that the vendor had retained his lien upon the premises for the balance of the purchase-money : *Winter v. Anson (Lord)* (1827), 3 Russ. 488.

(2) The W. Improvement Commissioners gave N. notice to treat for certain property. N. claimed 960*l.* for compensation. A jury awarded 750*l.* The defendants never paid or invested any part of the money, but took possession and pulled down part of the premises :—*Held*, that these transactions could not affect the vendor's lien, and that the plaintiff was entitled to a decree for specific performance : *Nash v. Worcester Improvement Commissioners* (1855), 1 Jur. (N.S.) 973.

(3) An agreement was made between the M. K. Railway Co. and the plaintiff for the sale by him of certain land. The price was afterwards fixed by arbitration, but the amount was not paid. At a later date the undertaking of the M. K. Company was purchased by the S. E. Company :—*Held*, that the plaintiff had a lien on the land for his money, and the S. E. Company were bound to pay it : *Hucker v. Mid-Kent Ry.* (1865) 12 L. T. 699.

(4) W. having agreed with a railway company to sell certain land required, his title was accepted and the conveyance executed. The company, however, failed to pay the purchase and compensation moneys, and W. filed a bill for specific performance and for payment to him of the two deposited sums, which were exceeded in amount by the purchase and compensation moneys :—*Held*, that the owner of land, of which promoters have taken possession either under the 85th section or by agreement, has a lien on the land for the purchase-money and also for the money payable to him as compensation for damage by severance and injury to his adjoining land, unless such compensation is the subject of a separate agreement between him and the promoters, and that W. had not been deprived of his lien by reason of the company having made a deposit and executed a bond under sect. 85 of the Lands Clauses Act, or by accepting a deposit in the names of trustees instead of the statutory deposit, if the purchase and compensation moneys exceed the amounts deposited. Romilly, M.R., made a declaration of lien, and referred it to chambers to ascertain what was due to W. for principal, interest and costs, and ordered a sale of the land in default of payment, although the railway had been made over the land and opened for public use : *Walker v. Ware Ry.* (1865), L. R. 1 Eq. 195.

(5) On an application by unpaid vendors against two railway companies (the purchasers and their lessees), the Court decreed specific performance and payment of the purchase-money within three months, and made an order declaring that the vendor had a lien against both companies, leave being given to apply for the appointment of a receiver to enforce the lien : *Winchester (Bishop of) v. Mid-Hunts Ry.* (1867), L. R. 5 Eq. 17.

(6) A railway company served a notice to treat upon the lessee of lands required for the railway, and, having agreed with him upon the amount of compensation to be paid, was allowed to take possession of the property. The company having failed to pay the agreed sum, the plaintiff filed his bill for specific performance and for a declaration of lien, and for foreclosure and a sale of the residue of his term. A decree was made by the Court for an immediate sale of the property and the payment of the purchase-money into the bank : *Sedgwick v. Watford and Rickmansworth Ry.* (1867), 36 L. J. Ch. 379.

(7) A company agreed to purchase certain lands of V., and, under a later agreement, deposited 4,000*l.* in a bank and took possession. The value of the premises having been ascertained to be 11,067*l.*, the deposit, amounting to 4,317*l.*, was paid out to V. upon an interlocutory application. Default having been made in payment of the balance, a decree for specific performance was obtained and a declaration of lien made by the Court in V.'s favour. The company having again made default, V. presented a petition for enforcing his lien by raising the amount found due to him by means of a sale of such of the lands taken as would be sufficient for that purpose. Romilly, M.R., granted the prayer of the petition : *Vyner v. Hoylake Ry.* (1868), 17 W. R. 92.

(8) A railway company took possession of land wanted for a railway, paid money into court, and executed a bond for a like sum, under sect. 85 of the Lands Clauses Act. Afterwards, requiring additional land, W., the owner, agreed to sell what was required, at a price which included all the land formerly his. The company took possession and made the railway, but failed to pay W. the purchase-money fixed by the agreement. W. accordingly obtained a decree for specific performance and for payment of the money within three months :—*Held*, that, in default of payment, W. was entitled to a sale of the land, although the railway had been made and was ready for traffic : *Wing v. Tottenham and Hampstead Junction Ry.* (1868), L. R. 3 Ch. 740. "We must assume that the Legislature knew that owners of land have rights which have long been recognised by this Court, among which is this—that the land sold remains, in the eye of this Court, subject to the lien of the vendor until it is paid for. That being so, the Court must uphold that right until it is expressly taken away. I find nothing in the Lands Clauses Act which would have that effect": *per* Page Wood, L.J., at p. 742, *ib.* "It is said that as to part of

the land this landowner has deprived himself by his agreement of the rights which he otherwise would have had ; but it is admitted that he has a lien for the unpaid purchase-money, and the agreement contains no clause by which he is precluded from the best mode of enforcing it. Then, as to the rest of the land which was taken under the 85th section of the Lands Clauses Act, that section provides security to the vendor for the value of the land, and cannot be construed as intending by implication to preclude him from any means of enforcing payment. The deposit paid into court is the price which the company pays for the privilege of taking immediate possession ; and I think that the object of that section is fully satisfied when the company have obtained possession, and that the ordinary remedies of a vendor in respect of his unpaid purchase-money remain unaffected. I have no hesitation in saying that the whole practice of the Court shows that a vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other person" : *per Selwyn, L.J.*, at pp. 744, 745, *ib.*

(9) The plaintiff filed his bill to enforce his lien for the value, ascertained by arbitration, of part of his land taken by a railway company and over which the line had been constructed. The Court decreed a sale of the land taken in default of payment within three months : *Raper v. Crystal Palace and South London Ry.* (1868), 16 W. R. 413.

(10) A railway company agreed to purchase from W. a house and land, which were subject to a lease to G. for twenty-one years, of which four years were unexpired, at the price of 2,500*l.*, and to pay 500*l.* for compensation. The purchase not being completed, W. filed his bill for specific performance and declaration of his lien. The Court made a decree for specific performance and declaration of lien ; and the company were afterwards served with the decree, and W.'s solicitor demanded payment. The company replied that they had no means with which to pay. W. thereupon presented a petition for an order directing the sale of the property, in default of payment, by a short day. The order was made : *Williams v. Great Eastern Ry.* (1868), 16 W. R. 821.

(11) P. sold land by agreement to the N. Railway Co. and received a bond for the purchase-money ; not being paid, he brought an action on the bond, recovered judgment, and levied execution. In consequence of claims in interpleader he only recovered part of the purchase-money :—*Held*, that he was entitled to a decree for specific performance and to a declaration of lien : *Pell v. Northampton and Banbury Ry.* (1869), 17 W. R. 506.

(12) An unpaid vendor brought an action to enforce his lien by means of a sale against two railway companies, one of which was working the line constructed by the other company, the C. P. Company. The Court decreed that, upon default of payment within one month by the C. P. Company, the plaintiff would be entitled to a lien on the lands as against both companies. Default was made by the C. P. Company, and shortly afterwards proceedings in the suit were, by the arbitrator's first award (made under the L. C. and D. Company's Act), stayed as against that company. Upon petition by the plaintiff praying that the amount due under the above order for principal, interest, and costs might be raised by a sale, and in the meantime for an injunction and receiver, an order was made as prayed : *St. Germain's (Earl) v. Crystal Palace and South London Ry.* (1871), L. R. 11 Eq. 568.

(13) In June, 1865, a railway company agreed to purchase certain lands, and in August, 1865, took possession thereof. In August, 1866, it was arranged that the purchase should stand over, upon the company paying interest. Since March, 1867, the payment of interest had ceased, and the purchase-money remained unpaid. In January, 1870, the vendor sought specific performance and consequential relief, including a declaration of lien. Bacon, V.-C., following *Munns v. Isle of Wight Ry.*, 5 Ch. 414, ordered a sale of the land (over which the railway had been made), the plaintiff to be at liberty to bid at the sale, but refused an injunction to stop the running of trains : *Lycett v. Stafford and Uttoxeter Ry.* (1872), L. R. 13 Eq. 261.

(e) The unpaid vendor does not lose his lien by taking a bond unless he has agreed to take the same as security instead of cash.

NOTE.—See *Pell v. Northampton and Banbury Ry.* (1868), 16 W. R. 1077; 17 W. R. 506, *ante*, p. 66.

(f) A vendor has no lien on land which he has sold in consideration of a rent-charge.

NOTE.—As to the power given in certain cases to distrain for non-payment of the rent-charge, *see* sect. 11, *post*, p. 100.

Illustration.

The plaintiff had entered into an agreement with the defendant company for the sale to them of certain lands for a rent-charge. The company had taken possession, but had not completed. They were in financial difficulties, and had not paid the rent-charge from the date of taking possession. In an action for specific performance and for a declaration that the plaintiff had a lien upon the land for the unpaid arrears of rent-charge, specific performance was granted; but as it was held that the plaintiff had intended to part with his property in exchange for the covenant to pay the rent-charge, the case was not analogous to that of an unpaid lump-sum purchase-money, and that the plaintiff had no lien on the land: *Jersey (Earl) v. Briton Ferry Floating Dock* (1869), L. R. 7 Eq. 409.

(g) A vendor does not lose his lien because the company have not required a conveyance or because the railway has been constructed and is opened for traffic.

Illustrations.

(1) By a deed of submission made between L. and a railway company it was provided that it should be referred to T. to determine the value to be paid for the lands; that the purchase-money should be paid within three days after the making of the award; and that "thereupon" L. should execute a conveyance, subject to the payment of the amount of such purchase-money into the Court of Chancery under the circumstances, and in the manner provided for by the Lands Clauses Act. The arbitrator found the value of the land at a certain sum, and directed it to be paid "within three days after," &c., "subject" &c. (following the words of the submission). The submission having been made a rule of Court, and a rule having been obtained calling upon the company to show cause why they should not pay the money:—*Held*, that the payment of the money and the execution of the conveyance by L. were not dependent conditions, but that the payment was to precede the conveyance; and that it was therefore no answer to the present rule that a conveyance had not been tendered: *Lindsay v. Direct London and Portsmouth Ry.* (1850), 1 L. M. & P. 529.

(2) K. sold lands by agreement to the A. Railway Co. The company entered into possession and the railway was made and opened, but the company never required a conveyance from K., nor did they pay the purchase-money. K. filed his bill for specific performance:—*Held*, that K. was entitled to specific performance and a declaration of lien enforceable by sale: *Keane v. Athenry and Ennis Ry.* (1870), 19 W. R. 43.

NOTE.—It would seem that a vendor who has obtained a decree of specific performance can enforce a lien on the land, but not when the result would be an undue preference over debenture-holders or over other persons not parties to the suit.

Illustrations to Note.

(1) An agreement having been made for the sale of certain land to a railway company, a decree for specific performance was afterwards obtained, and the amount, when found due, was ordered to be paid, but was not declared to be a charge on the land :—*Held*, that the vendor was not entitled (in the absence of a suit for a declaration of lien) to enforce by petition a lien on the land for the money due, especially as there were encumbrancers not parties to the suit : *Attorney-General v. Sittingbourne and Sheerness Ry.* (1866) L. R. 1 Eq. 636.

(2) Where a decree or specific performance had been obtained by a vendor against a railway company of a contract for sale, and the company afterwards became insolvent :—*Held*, on a petition subsequently presented by the vendor, that he was entitled to a declaration of lien for his unpaid purchase-money : *Heriot v. London, Chatham and Dover Ry.* (1867), 16 L. T. 473.

(h) A vendor has no lien on the land for the costs of an arbitration in cases where the purchase-money has been determined by arbitration.

Illustration.

Notice to treat was given to F. by a railway company, and the amount of purchase-money and compensation fixed by arbitration, this amount being larger than that offered. The company took possession and constructed their works. The purchase-money and compensation were paid into court, but the company failed to pay the costs of the arbitration. F. therefore filed a bill claiming a lien as unpaid vendor in respect of these costs :—*Held*, that he was not entitled to such a lien : *Ferrers (Earl) v. Stafford and Uttoxeter Ry.* (1872), L. R. 13 Eq. 524.

(k) Where an order was made for sale by public auction and the attempt to sell proved abortive, a fresh order was made authorising a sale either by public auction or private contract.

Illustration.

A railway company agreed with a rector to purchase from him a portion of the glebe at a price to be determined by two surveyors. The company afterwards took possession without the vendor's consent and without having paid or deposited the purchase-money, and accepted the vendor's title and constructed their line over the land. The Court made a declaration of lien, and ordered a sale by public auction in default of payment. The attempt to sell having proved abortive, Lord Selborne, C., directed a sale by public auction or private contract, and remarked that "if this order fail, some other course may perhaps suggest itself" : *Williams v. Aylesbury and Buckingham Ry.* (1873), 28 L. T. 547.

(l) The unpaid vendor may have leave to bid at the sale directed by the Court.

Illustrations.

(1) The Court on an application by an unpaid vendor made an order for a sale of the land taken by the railway company, and gave the plaintiff liberty to bid at such sale : *Lycett v. Stafford and Uttoxeter Ry.* (1872), L. R. 13 Eq. 261.

(2) In an application for enforcing an unpaid vendor's lien by a sale of the lands, an order was made directing a sale by public auction or private contract, as the judge in chambers should direct, with liberty to the plaintiff to bid : *Ware v. Aylesbury and Buckingham Ry.* (1873), 21 W. R. 819.

(m) When land purchased by a company is sold to enforce the vendor's lien for unpaid purchase-money, it is sold free from all claims of the public to use it as a highway.

Illustration.

"There cannot be a doubt that if a railway company contract with a person to buy land of him for the purpose of making their railway over it, they can only give to the public such rights as they have ; and if their rights are subject to the rights of the vendor, the rights of the public must necessarily be subject to, and cannot be allowed to interfere with, the rights of the vendor" : *per* Sir G. M. Giffard, L.J., in *Munns v. Isle of Wight Ry.* (1870), L. R. 5 Ch. at p. 418.

(n) The application by an unpaid vendor for the enforcement of his lien may be made either by motion or by petition.

See *Lycett v. Stafford and Uttoxeter Ry.* (1872), L. R. 13 Eq. 261 ; *Allgood v. Merrybent and Darlington Ry.* (1886), 33 Ch. D. 571 (where the application was by motion), and *Munns v. Isle of Wight Ry.* (1870), L. R. 5 Ch. 414 ; *Williams v. Aylesbury and Buckingham Ry.* (1873), 21 W. R. 819 ; *Ware v. Aylesbury and Buckingham Ry.* (1873), 21 W. R. 819 (where the application was made by petition).

(o) Rescission of contract by the Court.

Where the unpaid vendor has obtained a decree for specific performance, with a declaration of lien, and is given liberty to apply to enforce same, the Court has power, upon default, to make an order rescinding the contract.

Illustration.

A vendor sought specific performance of an agreement to purchase freehold land. The statement of claim alleged that the title had been accepted by the defendant. The defence consisted merely of a denial of the agreement. Judgment was given for specific performance, with directions for the usual accounts and payment of the balance to be found due ; also a declaration that the plaintiff was entitled to a lien upon the property in respect of the balance, with liberty to apply, if default were made in payment of the balance, to enforce such lien, and generally as might be advised. The defendant made default in payment, and an application that the agreement might be rescinded, and all further proceedings in the action stayed, was granted : *Baker v. Williams* (1893), 62 L. J. Ch. 315.

(p) Parties to action for specific performance.

(i.) In the absence of special circumstances, the parties to the agreement are the only necessary parties to an action for specific performance.

Illustrations.

(1) A railway company gave notice to P. to treat for the purchase of certain lands. In 1847 a formal agreement was entered into between P. and the company, as the only parties thereto, for the purchase of the lands for 400*l.* at least, but a valuation was to be made, and, if more than 400*l.* should be awarded, the company were to pay the difference. Upon an action by P. to enforce specific performance of this agreement, it was objected that the plaintiffs, P. and others, were only trustees, and that the persons beneficially entitled ought to have been made parties :—*Held*, that the parties to the contract were the only necessary parties to the action : *Potts v. Thames Haven Ry.* (1851), 15 Jur. 1004.

(2) "It seems plain that the South-Western Co. have been very properly brought before the Court. It was said that the South-Western Co. are in the situation of an ordinary tenant only, and that it is contrary to the course of the Court, where a vendor has parted with possession and not received his purchase-money, to bring before the Court the tenant to whom a demise has been made by the purchaser. Ordinarily, a person not being a party to the contract ought not to be brought before the Court. But it is otherwise where possession is sought by the bill, and the person in possession will be affected by the decree" : *per* Stuart, V.-C., in *Winchester (Bishop) v. Mid-Hants Ry.* (1867), L. R. 5 Eq. at p. 20.

- (ii.) Subsequent incumbrancers ought to be made parties to a suit for specific performance.

Illustration.

"Even assuming that the decree obtained had established that the petitioner is right, and is entitled to a lien or charge upon this property, and that the amount had been ascertained, neither the plaintiffs . . . nor the London, Chatham and Dover Co. were present at the taking of the accounts, though both of them are materially interested in disputing the amount claimed ; and if I directed a sale, I should, in fact, without a suit and without a decree for the purpose, be giving priority to the charge of the Crown over the other charges, and foreclose them by directing the purchase-money to be paid to the petitioner on behalf of the Crown without the others having had any opportunity, not merely of contesting the right of the petitioner, but of contesting the extent of that right" : *per* Lord Romilly, M.R., in *Att.-Gen. v. Sittingbourne and Sheerness Ry.* (1866), L. R. 1 Eq. at p. 639.

- (iii.) If the line is worked by a company other than the purchasing company the company working the line should be made parties to a suit for specific performance.

Illustrations.

(1) Where the defendant company's line had been leased to the S.-W. Railway Co., it was *held* that the latter company had been rightly made parties upon the application for an injunction, for a declaration of lien, and for the giving of possession to the unpaid vendor : *Winchester (Bishop) v. Mid-Hants Ry.* (1867), L. R. 5 Eq. 17.

(2) M. sold land by agreement to the S. Railway Co. The company took the land and constructed the railway, which was worked by the M. Company under a traffic agreement sanctioned by Parliament. The purchase-money had not been paid. M. brought his bill against both companies for specific performance, declaration of lien, injunction against remaining in possession, and for a receiver :—*Held* (following *Winchester (Bishop) v. Mid-Hants Ry.*, L. R. 5 Eq. 17), that the M. Company were in a similar position to

lessees and were properly made defendants: *Marling v. Stonehouse and Nailsworth Ry.* (1869), 38 L. J. Ch. 306.

(3) Where one railway company had, by Act of Parliament, acquired the right to work and use the lines of another company, it was *held* that the former company were a proper and necessary party to a bill for specific performance filed by an unpaid vendor against the latter company: *Goodford v. Stonehouse and Nailsworth Ry.* (1869), 38 L. J. Ch. 307.

- (iv.) Mortgage debenture-holders who have obtained a receiver are rightly made parties in an action by an unpaid vendor against a railway company.

Illustration.

In an action by an unpaid vendor against a railway company, two persons were made defendants on the ground that they had, as holders of mortgage debentures of the company, obtained in another action a receiver of the tolls and sums of money arising out of the undertaking:—*Held*, that they had been rightly made co-defendants: *Drax v. Somerset and Dorset Ry.* (1868), 38 L. J. Ch. 232.

- (v.) If after a decree of specific performance the company become insolvent, other parties “whose interests would be affected” need not be before the Court on a petition asking for declaration of the unpaid vendor’s lien.

Illustration.

A vendor obtained against a railway company a decree for specific performance. The company afterwards became insolvent, and the unpaid vendor presented a petition asking for a declaration of his lien. It was contended that such a declaration could not be made in the absence of most of the parties whose interests would be affected by it; but Stuart, V.-C., said: “I consider that the petitioner is entitled to a declaration of lien for his unpaid purchase-money. The rest of the petition must be adjourned to chambers”: *Jeriot v. London, Chatham and Dover Ry.* (1867), 16 L. T. 473.

NOTE.—The foregoing rules as to the parties to an action for specific performance must now be regarded or acted upon subject to the provisions of Ord. XVI. of the Rules of the Supreme Court, under which all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative; and all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. *See*, further, the various rules of Ord. XVI.

X. Interest on purchase-money.

“Where, as is usually the case, the contract fixes a time for completion, there *primâ facie* and in the absence of stipulation, the time so fixed is the time from which the purchaser is liable to the payment of interest and is entitled to the rents. But this rule must be taken subject to several exceptions”: Fry, *Sp. Perf.*, 4th ed., 593.

Such exceptions are where the interest is much more in amount than the rents, and the delay in completion is due to the vendor's conduct (*see next article*); where the title is made out in chambers; where the contract leaves the purchase-money to be ascertained afterwards; or where the purchase-money has been appropriated by the purchaser and notice of the fact has been given to the vendor.

NOTE.—In assessing compensation under sects. 78 *et seq.* of the Railways Clauses Act, 1845, the arbitrator has no jurisdiction to award interest from the date of the notice not to work the minerals to the date of the award (*see Richard v. Great Western Ry.* (1904), 21 T. L. R. 37, *post*).

The following are the principal cases in which, apart from express stipulation, interest on the purchase-money becomes payable by the purchaser :—

(a) Interest becomes payable from the time when a good title has been shown.

Illustrations.

(1) In an action of debt to recover a sum awarded to the plaintiffs by a jury, under statute, as compensation payable by a dock company for injury done to the plaintiff's property by the authorised works :—*Held*, that the jury might give interest for the detention of the sum awarded : *Hilhouse v. Davies* (1813), 1 M. & S. 169.

(2) A railway company in June, 1847, agreed to purchase certain lands in the cause. The money was to be paid into the bank in the joint names of the solicitors pending the approval of the agreement by the master. The master approved the agreement in 1848. The money remained in the bank till March, 1850. The company were then ordered, upon motion, to pay the money into court, with interest from the date of the agreement : *Chambers v. White* (1850), 14 Jur. 1129.

(3) A railway company gave notice to treat as to certain settled lands. The company proposed to pay the purchase-money into the bank (in the joint names of the solicitors) pending the investigation of the title. The solicitors of the tenant for life suggested that the money should at once be paid into court, which was done, and they pointed out that interest would still be payable till completion. The company did not object, till a year later, to the payment of interest, and it was held that they had assented to the arrangement : *Ex parte Earl of Hardwicke* (1852), 1 De G. M. & G. 297.

(4) It was held that interest at 4 per cent. from date of verdict was payable, although actual possession was not taken until later : *In re Eccleshill Local Board* (1879), 13 Ch. D. 365.

(5) A railway company gave notice to treat as to certain lands, and the price was fixed by arbitration. Delays arose from disputes as to title and other matters. The company had not taken possession :—*Held*, that the vendor was entitled to interest on the purchase-money from the date when the company might safely have taken possession—*i.e.*, from the date when a good title was shown : *In re Pigott and Great Western Ry.* (1881), 18 Ch. D. 146; followed in the next case (*Spencer Bell to London and South-Western Ry.*).

(6) Land subject to a mortgage was taken by a railway company under compulsory powers. A good title having been shown, it was *held* that interest on the purchase-money was

payable from the time when possession might have been taken by the company, the fact that the legal estate was outstanding making no difference. But interest was payable by the vendor to the mortgagee in lieu of six months' notice: *Spencer Bell to London and South-Western Ry.* (1885), 33 W. R. 771.

(b) Interest becomes payable from the date on which possession was taken under statutory powers, and not merely from the date when the purchase-money was assessed.

Illustrations.

(1) In *Willey v. South-Eastern Ry.* (1849), 1 Mac. & G. at p. 70, Lord Cottenham, C., expressed a doubt as to the date from which interest ought to become payable in a case where the first bond given was invalid and a valid one was afterwards executed. "The question may arise," he said, "whether the interest is payable from the time of the original possession (not being a possession under the 85th section) or whether it is to be calculated from the time at which the possession was set right by the condition of the bond being corrected."

(2) A railway company served a notice to treat, but, failing to arrange the sale of the property with the owners, proceeded by inquisition, and, after verdict, went into possession in May, 1847. In March, 1848, an abstract of title was delivered to the company, and from that time to January, 1851, a correspondence took place relating to the title and to a claim made by the owners for interest. The company at length refused to pay interest, and in January, 1851, lodged the purchase-money in the Bank of Ireland. The owners then sued for specific performance and interest at 5 per cent. upon the purchase and compensation moneys from the date when the company took possession:—*Held*, that in these circumstances the relation of vendor and purchaser existed; also that the owners were entitled to the interest as asked for: *Blount v. Great Southern and Western Ry.* (1851), 2 Ir. Ch. R. 40.

(3) A railway company having determined to acquire certain land, served a notice on the owner, and, desiring to obtain possession at once, deposited the sum named by a surveyor in bank, and gave the bond required by sect. 85. The owner gave notice to have the amount of compensation settled by a jury. By some misapprehension the company neglected for more than twenty-one days to issue their warrant to the sheriff to summon a jury, and the company had to pay the owner 900*l.*, the amount claimed by him:—*Held*, that they were liable to pay interest thereon at 5 per cent. from the time when they entered into possession: *In re Aberdare Ry.* (1860), 8 W. R. 603.

(4) A company, upon taking possession, deposited 352*l.* as security, but, through the negligence of the company, the amount of compensation was not assessed until twelve years later. The amount paid in was never invested:—*Held*, that the company must pay 5 per cent. interest on the money for the whole period in the terms of the bond: *In re Wolff's Settlement* [1868] W. N. 66.

(5) C., a lessee under a building lease, agreed in 1866 to sell part of the demised premises to a railway company, the price in case of difference to be referred to a surveyor, to be mutually agreed upon. The company had, at the date of the agreement, a Bill before Parliament to enable them to take C.'s land, but it had not then become law. The surveyor made his award in 1868:—*Held*, that the relation of vendor and purchaser was not established till the price was ascertained, and that C. was not entitled to interest on the purchase-money up to that date: *Catling v. Great Northern Ry.* (1869), 18 W. R. 121.

(6) In August, 1864, the defendant company served the plaintiffs with notice to treat for certain lands, and in November, 1864, the company took possession. Owing to

incessant litigation the price was not finally fixed till August, 1869, and in 1873 the plaintiffs filed a bill to obtain specific performance. The only question was as to the interest on the purchase price, and it was *held* that this must be computed from the date of taking possession by the railway company, and not from the date when the price was fixed: *Rhys v. Dare Valley Ry.* (1874), L. R. 19 Eq. 93.

(7) The Corporation of W., under statutory powers, entered on land and lodged in court the value assessed by the arbitrator; on a traverse of the award the verdict was for an increased sum, and 20*l.* costs were awarded. The corporation then lodged in court the additional sum, but not the costs. It was *held* that interest at 4 per cent. was payable on each sum from the date of entry to the date of its lodgment, and that there was jurisdiction on summary petition to direct payment of the costs: *In re Waterford Water Act, Ex parte Sullivan* (1877), 12 Ir. L. T. 1.

(8) L. sold land by agreement to the D. Corporation, but could not make a title. The corporation then took the land under compulsory powers. An award was made on May 12th, 1882. The corporation entered into possession on May 20th, 1883, and paid the purchase-money into the bank on the same day. L. claimed interest from the date of the award:—*Held*, that the corporation were not liable to pay this interest: *In re Lindsey* (1883), 11 L. R. Ir. 392.

(9) Lands which were vested in trustees for the benefit of D.'s creditors being required for the purposes of waterworks, an arbitrator was appointed, by whom the sum of 2,900*l.* was awarded to D. for his interest in the waters, and 1,123*l.* as compensation. The purchasers, being desirous of taking possession, paid these two sums into the Bank of Ireland. D. having traversed the award as to a part of it, the sum of 3,750*l.* was found in his favour by the jury, being 1,012*l.* 10*s.* more than the corresponding amount of the award. D. failed to make out a good title to the waters and lands; and the purchasers then presented a petition asking for the transfer of the two sums of 2,900*l.* and 1,123*l.* to a new credit, and for leave to add the further sum of 1,012*l.* 10*s.* to the same credit. An order was made to this effect on June 12th, 1882; the purchasers lodged the whole of the principal on July 24th, 1882; and on February 23rd, 1883, the sum of 5,036*l.* 1*s.* 11*d.* was invested in Three per Cent. stock:—*Held*, that the interest becoming payable, under the Railways (Ireland) Act, 1860, s. 2, upon possession being taken, was so payable from the date of entry upon the lands to July 24th, 1882, and no longer: *In re Belfast Water Commissioners, Ex parte Dalway* (1884), 15 L. R. Ir. 13.

(10) An owner of lands taken by a railway company, under statutory powers, executed a conveyance to the company of his interest in the lands in consideration of 80*l.*, being the amount of compensation awarded him on the hearing of a traverse. No claim for interest was made at the time of the execution of the conveyance:—*Held*, that the execution of the conveyance did not stop the owner from afterwards claiming interest on the amount awarded from the date of entry upon the lands down to the date of payment of the amount awarded: *In re Baltimore Extension Ry., Ex parte Daly*, [1895] 1 I. R. 169.

(c) Interest will run from the date on which the purchaser has exercised the rights of ownership, though he may not actually have gone into possession.

Illustration.

The defendant had agreed with the plaintiff for the purchase of certain waste or building land. He had not taken possession, but he had put up notices to the effect that the land was to be disposed of, and referring inquirers to himself, and he had negotiated some contracts as to the land. It was *held*, in an action brought by him for specific performance, that even though the delay in completion arose from the fault of the vendor,

the purchaser must pay interest on the purchase-money from the date of his exercising such acts of ownership over the land: *Bullard v. Shutt* (1880), 15 Ch. D. 122.

(d) If on appeal the price or compensation is increased, interest on the difference is payable from the date of taking possession.

Illustrations.

(1) A company took possession of lands under their statutory powers and lodged in court the sum awarded as compensation by the arbitrator, which was afterwards increased:—*Held*, that interest (4 per cent.) upon the difference was payable from the date of the taking of possession: *Re Navan and Kingscourt Ry.* (1876), Ir. R. 10 Eq. 113.

(2) A corporation gave notice to treat for certain lands required by them under and for the purposes of the Artisans' and Labourers' Dwellings Improvement Act, 1875, and the compensation was fixed by an arbitrator appointed under the provisions of the Act by the Local Government Board. He made his award, and the corporation paid the amount into the bank and took possession. The owner gave notice of appeal, and subsequently obtained from a jury a verdict for a larger sum:—*Held*, that interest was payable on the larger sum from the date of the first payment: *In re Shaw and Birmingham Corporation* (1884), 27 Ch. D. 614.

(e) If delay in completion takes place through the default of the vendor, interest will not be payable after the date when completion ought, but for such default, to have taken place.

Illustrations.

(1) The defendant company desired to purchase certain lands and to get immediate possession. They agreed to pay the price which might be awarded, with interest from the date of delivery of the abstract of title till completion. The price was fixed, the abstract delivered, and the purchase-money paid into the Bank of England under the Lands Clauses Consolidation Act:—*Held*, that interest under the agreement was only payable till the payment of the purchase-money into the bank, that being in effect completion by the purchaser: *Lewis v. South Wales Ry.* (1852), 10 Hare, 113.

(2) A railway company acquired from D. a small plot of land, as to which, owing to D.'s not having paid off incumbrances affecting the land taken, he could not make a good title:—*Held*, that the Court had no jurisdiction to make any order as to the payment of interest on the purchase-money: *In re Divers, In re Crystal Palace Ry.* (1855), 1 Jur. (N.S.) 995.

(3) A company having given notice to take land under compulsory powers, the title having been accepted and the price subsequently fixed, and the vendor having neglected to execute a conveyance, notice was given by the company to the vendor that the purchase-money was lying idle. It was *held* that interest at 4 per cent. per annum was payable up to the date of such notice from the time when the price was fixed; and that the vendor must account for the rents and profits from the time when the price was fixed to the time when the company obtained possession of the land, as a trustee, and not as a mortgagee in possession: *Regent's Canal v. Ware* (1857), 23 Beav. 575.

(4) Where no steps are taken by an owner to get the amount of compensation due to him fixed, until long after the claim has arisen, he cannot claim interest upon the amount ultimately found: *Caledonian Ry. v. Carmichael* (1870), L. R. 2 H. L. Sc., 56.

(f) In the case of settled land, when promoters have paid the money into the bank instead of to the trustees, the Court will not give interest, the remedy of the trustees being in damages.

Illustration.

The Great Western Railway Co. had paid into the bank the purchase-money for certain settled lands acquired by them under their powers. The trustees claimed to be entitled to the money, and petitioned to have it paid out to them and for an order that the company should pay interest :—*Held*, that the Court had no power to grant interest on such an application : if the trustees wanted damages they must bring an action : *Ex parte White, In re Great Western Ry.* (1840), 9 L. J. Ex. Eq. 9.

(g) An agreement may validly be made providing for an increased rate of interest in the event of the purchase-money not being paid at the stipulated date, but such a provision will prevent the Court ordering completion, since the parties have contemplated delay.

Illustrations.

(1) The defendant company had agreed to purchase certain lands and to pay the purchase-money on or before July 1st, 1858, with interest at 4 per cent. from the date of taking possession—should the purchase-money not be paid on that date, the company to pay interest at 5 per cent., and after January 1st, 1859 (should the purchase-money still be unpaid), at 8 per cent. on all moneys remaining due under the agreement until payment thereof. Owing, as the defendant company alleged, in part to difficulties as to the title, but not through any wilful default or negligence of the vendor, the conveyance was not executed, and the purchase-money was not paid till 1865 :—*Held*, that the agreement to pay increased interest was valid, and not in the nature of a penalty : *Herbert (Lady) v. Salisbury and Yeovil Ry.* (1866), L. R. 2 Eq. 221.

(2) “As for the delay, the parties have expressly provided for it, the contract containing an express stipulation that in the event of delay, not occasioned by the default of the vendor, an increased rate of interest is to be payable” : *per* Turner, L.J., in *Pryse v. Cumbrian Ry.* (1867), L. R. 2 Ch. 444.

(h) But where an agreement provides for a penalty in the event of non-completion, relief will be granted against this provision, upon payment of the balance of purchase-money, with interest.

Illustration.

A dock company agreed to purchase certain lands for 4,000*l.* : 2,000*l.* was to be paid at once, and the remainder (with interest) at a later date. If any part of the purchase-money or interest remained unpaid at the later date the lands were to revert to the vendor, and the money paid was to be forfeited and retained by him :—*Held*, that the agreement was in the nature of a penalty, and the company, who had made default in payment, were entitled to relief upon paying the balance of the purchase-money, with interest : *In re Dagenham (Thames) Dock* (1873), L. R. 8 Ch. 1022.

(k) Rent and Profits.

If the purchase-money is not paid and the vendor retains possession,

he may or may not have to pay occupation rent. It seems that this depends upon who is during that period responsible for outgoings. The purchaser may have to pay interest.

Illustrations.

(1) Where a purchaser has for some years been in possession, and has received the rents and profits, the Court will not enforce an agreement that no interest is to be paid on the unpaid purchase-money : *Birch v. Joy* (1852), 3 H. L. Cas. 565.

(2) In 1867 the plaintiff sold to the defendant company a house in which he carried on the business of a victualler. The price was fixed to be paid in March, 1869, or earlier, the company to pay interest at 5 per cent. and the plaintiff paying to the company a yearly rent. If the company desired possession before March, 1869, they were to give three months' notice, possession to be given on payment. The tenancy was terminable in March, 1869, on seven days' notice. The plaintiff gave the company notice to determine the tenancy in March, 1869, but the company were not ready with the purchase-money. The plaintiff retained possession, refused to pay rent, and filed a bill for specific performance :—*Held*, that the company were bound to pay interest after (as well as before) March, 1869, and they were not entitled to any allowance from the plaintiff by way of occupation rent : *Leggott v. Metropolitan Ry.* (1870), L. R. 5 Ch. 716.

(3) A sheriff's jury, awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to 5,272*l.*, saying, however, nothing as to interest. The Court below added to the principal sum twelve years' interest. The House of Lords reversed this decision : *Caledonian Ry. v. Carmichael* (1870), L. R. 2 H. L. Sc. 56. "Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid" : *per* Lord Westbury at p. 66, *ib.*

(4) The plaintiff company agreed with the defendant for the purchase of certain premises of which the defendant was in possession. The purchase was to be completed and possession given to the company in September, 1869, up to which time all outgoings were to be paid by the vendors, and after which time the company were to receive all rents and profits, and the company were to pay interest on the purchase-money from September, 1867, until completion. The purchase was not completed till March, 1876 :—*Held*, that the defendant (who remained in possession) must pay a fair occupation rent : *Metropolitan Ry. v. Defries* (1877), 2 Q. B. D. 387.

(5) The owner of mines having given statutory notice of his intention to work the mines beneath a canal belonging to the defendant company, the latter gave him a counter-notice requiring certain masses of coal to be left and offering to make compensation therefor. All questions were, by agreement, left to the decision of an arbitrator, who awarded purchase-money and compensation, and interest thereon from the date on which the company had given the counter-notice :—*Held*, that from the date of the counter-notice the owner of the mine had been deprived of his property, while the company had enjoyed both that and the purchase-money, and that on the principle laid down in *Birch v. Joy*, 3 H. L. Cas. 565, the owner of the mine was entitled to the interest : *Fletcher v. Lancashire and Yorkshire Ry.*, [1902] 1 Ch. 901.

NOTE.—This case turned upon the language of the special Act, which constituted the transaction a sale of the minerals (see *Richard v. Great Western Ry.*, *infra*).

(6) In assessing compensation due to a mineral owner who had been required by a railway company, under sect. 78 of the Railways Clauses Act, 1845, to leave certain coal

unworked for the support of their line, the arbitrator awarded interest on the amount of compensation from the date of the notice not to work the minerals down to the date of the award :—*Held*, that he had no jurisdiction to do so : *Richard v. Great Western Ry.* (1904), 21 T. L. R. 37.

(l) The right to have interest is not barred by the conveyance being silent on the subject.

Illustration.

A railway company under its compulsory powers acquired lands from D., who executed a conveyance to the company in consideration of payment of the amount of compensation awarded. No claim for interest was made when the conveyance was executed :—*Held*, that D. was not estopped from claiming interest from the date of entry to that of payment : *In re Baltimore Extension Ry., Ex parte Daly*, [1895] 1 I. R. 169.

7. It shall be lawful for all Parties, being
Parties under Dis- seised, possessed of, or entitled to any such
ability enabled to
sell and convey. Lands, or any Estate or Interest therein, to sell
 and convey or release the same to the Promoters of the
 Undertaking, and to enter into all necessary Agreements for
 that Purpose; and particularly it shall be lawful for all or
 any of the following Parties so seised, possessed, or entitled
 as aforesaid so to sell, convey, or release; (that is to say,) all
 Corporations, Tenants in Tail or for Life, married Women
 seised in their own Right or entitled to Dower, Guardians,
 Committees of Lunatics and Idiots, Trustees or Feoffees in
 trust for charitable or other Purposes, Executors and Adminis-
 trators, and all Parties for the Time being entitled to the
 Receipt of the Rents and Profits of any such Lands in posses-
 sion or subject to any Estate in Dower, or to any Lease for
 Life, or for Lives and Years, or for Years, or any less Interest;
 and the Power so to sell and convey or release as aforesaid
 may lawfully be exercised by all such Parties, other than
 married Women entitled to Dower, or Lessees for Life, or for
 Lives and Years, or for Years, or for any less Interest, not
 only on behalf of themselves and their respective Heirs,
 Executors, Administrators, and Successors, but also for and
 on behalf of every Person entitled in reversion, remainder, or
 expectancy after them, or in defeasance of the Estates of such
 Parties, and as to such married Women, whether they be of
 full Age or not, as if they were sole and of full Age, and as to
 such Guardians, on behalf of their Wards, and as to such

Committees, on behalf of the Lunatics and Idiots of whom they are the Committees respectively, and that to the same Extent as such Wives, Wards, Lunatics and Idiots respectively could have exercised the same Power under the Authority of this or the Special Act if they had respectively been under no Disability, and as to such Trustees, Executors, and Administrators, on behalf of their Cestui que Trusts, whether Infants, Issue unborn, Lunatics, Females Covert, or other Persons, and that to the same Extent as such Cestui que Trusts respectively could have exercised the same Powers under the Authority of this and the Special Act if they had respectively been under no Disability.

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NOTE.—Sect. 3 of the Railways Construction Facilities Act, 1864 (27 & 28 Vict. c. 121), *post*, extends the power conferred by sect. 7 of the Lands Clauses Act to the case of companies proceeding by way of certificate.

I. Preliminary.

Persons under disability empowered to sell under sects. 6 and 7 may claim the advantages of sect. 92.

Illustration.

A railway company was desirous of purchasing under its powers a portion of a hospital. The governors gave notice that they required the company to take the whole. The company objected that the governors had no power to sell:—*Held*, that persons under disability empowered to sell under sects. 6 and 7 of the Lands Clauses Act could sell and convey under sect. 92: *St. Thomas' Hospital v. Charing Cross Ry.* (1861), 1 J. & H. 400.

NOTE.—Sect. 7 has, in effect, created, for the purpose of the Act, certain persons as statutory owners. These may be classified thus:—

- i. Corporations.
- ii. Tenants in tail.
- iii. Tenants for life.
- iv. Married women.
- v. Guardians.
- vi. Committees of lunatics and idiots.
- vii. Trustees or feoffees in trust for charitable or other purposes.
- viii. Executors and administrators.
- ix. All parties entitled to the receipt of rents.

II. Persons empowered to sell and convey.

(1.) Corporations.

NOTE.—See also sects. 12, 14 and 15, *post*; the Lands Clauses Consolidation Acts Amendment Act, 1860 (23 & 24 Vict. c. 106); and the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 108, *post*.

- (a) A company which, apart from sect. 7, has no power to sell land can by virtue of the section sell and convey the same to a corporation authorised to take it, and can receive the purchase-money thereof.

Illustration.

Land was taken under statutory powers by the M. Board of Works for the purpose of making the approaches to a new bridge. The Act under which this work was done incorporated the Lands Clauses Act, and made provision for the abolition of the C. Company's old aqueduct across the river Thames at Putney, and for laying the company's new pipes along or under the new bridge and its approaches. The land taken formed part of the company's pipe tracks, and belonged to the company absolutely in fee simple. The company had no power of sale. The purchase-money was paid into court by the M. Board of Works:—*Held*, that the money was rightly paid into court, and that it was not necessary to reinvest the money in land, and that the company was absolutely entitled to the money: *In re Chelsea Waterworks* (1887), 56 L. T. 421.

- (b) This section does not give promoters of a railway, without special powers to that effect, the right to take land on which another railway is actually constructed.

Illustration.

The South Wales Railway Co. were empowered to construct a line which crossed the Llanelly Railway. They gave notice to the Llanelly Railway Co. that they required to purchase that portion of the Llanelly Railway Co.'s land included in their deposited plans. They had no power to construct a level crossing, and no special power to purchase that part of the land on which the Llanelly Railway was actually constructed. The Llanelly Railway had no power to sell the land on which their railway was constructed. The Court refused a *mandamus* requiring the South Wales Railway Co. to proceed to assess compensation for the purchase of the land on which the Llanelly Railway was constructed: *R. v. South Wales Ry.* (1850), 14 Q. B. 902.

- (c) Wards in the City of London are not municipal corporations within the meaning of the Municipal Corporations Act, 1835, and the consent of the Lords of the Treasury (now of the Local Government Board: 51 & 52 Vict. c. 41, s. 72) is not necessary before a sale by them can be completed. It is also unnecessary that the sale should be completed under the provisions of the Lands Clauses Act. The consent of the Charity Commissioners is not required for the sale of land belonging to a charity wholly supported by voluntary contributions.

Illustrations.

(1) A railway company was desirous of acquiring under their powers premises which had been purchased by one of the wards of the City of London, and was held by trustees on certain trusts on behalf of the ward. The defendants maintained that the consent of the Lords of the Treasury was required before the trustees could sell, under the Municipal Corporations Act, 1835, unless the sale was completed under the provisions of the Lands Clauses Act :—*Held*, that the Municipal Corporations Act did not apply to a ward of the City, and that the sale need not be completed subject to the provisions of the Lands Clauses Act : *Finnis to Forbes, Ex parte Finnis* (No. 1) (1883), 24 Ch. D. 587.

(2) Upon a further summons between the same parties :—*Held*, that a ward charity school which was wholly supported by voluntary contributions came within the exemptions of sect. 62 of the Charitable Trusts Act, 1853, and sect. 48 of the Act of 1855 ; that the consent of the Charity Commissioners to its sale was not necessary ; and that it was not necessary that the sale should be completed under the provisions of the Lands Clauses Acts : *Finnis to Forbes, Ex parte Finnis* (No. 2) (1883), 24 Ch. D. 591.

NOTE.—By sect. 108 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 60), the alienation of corporate land without the approval of the Treasury is restricted (*see* that Act, *post*) ; and by sect. 72 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the Local Government Board is substituted for the Treasury so far as regards any county borough or other borough.

(d) Ecclesiastical corporations.

Ground that has once been consecrated cannot be applied to secular purposes without an Act of Parliament unless it can be no longer used for ecclesiastical purposes ; but if undertakers have power to take land, consecrated land may be taken provided it is strictly used for the authorised purposes of the undertaking.

Illustrations.

(1) The guardians of a parish had applied to the Consistory Court of London for a faculty to authorise the erection of certain buildings on a disused churchyard. On an application for a writ of prohibition prohibiting the judge of the Consistory Court from proceeding further with the hearing, the Court refused the prohibition, but stated that it was clear law that ground which had once been consecrated could not be applied to secular purposes without an Act of Parliament : *R. v. Twiss* (1869), 10 B. & S. 298.

(2) The Court has jurisdiction by faculty to grant a strip of a closed churchyard for use as a footway so long as it shall be wanted for the purpose, with reversion to the church on ceasing to be so required, but not to grant the freehold of consecrated ground : *St. Mary Abbots (Vicar) v. Parishioners* (1873), Trist. 17.

(3) A petition was presented by a vicar and churchwardens for a faculty authorising the appropriation of a strip of land forming part of the churchyard for the purpose of widening a roadway. It was stated that no interments had been made within the part of the churchyard proposed to be so appropriated, and that inconvenience was caused to persons attending the church from there being no pathway on that side of the highway adjacent to the churchyard, and that if the proposed widening were sanctioned, it would be possible to make such a pathway :—*Held*, by the Chancellor of the Diocese of Rochester, declining to follow *St. Botolph (Vicar) v. Parishioners*, [1892] P. 161, and

following the *dicta* of Dr. Lushington in *Harper v. Forbes*, 5 Jur. (N.S.) 275, and of Cockburn, C.J., in *R. v. Twiss*, L. R. 4 Q. B. 407, that there was no jurisdiction to sanction the appropriation of consecrated ground to any secular purpose : *In re Plumstead Burial Ground*, [1895] P. 225. See (7), *infra*.

(4) The site of a church where intramural burial has taken place is not a place which has been "set apart for purposes of interment" within the meaning of the Metropolitan Open Spaces Act, 1881 : *In re Ecclesiastical Commissioners and New City of London Brewery Co.*, [1895] 1 Ch. 702.

(5) Part of a disused burial ground was sold to commissioners under Michael Angelo Taylor's Act, who subsequently resold part as surplus lands :—*Held*, that sect. 5 of the Disused Burial Grounds Act, 1884, excluded the land from the operation of that Act : *Att.-Gen. v. London Parochial Charities Trustees*, [1896] 1 Ch. 541.

(6) A piece of land was granted in fee to the Church Building Commissioners (now the Ecclesiastical Commissioners). A church was built on part of the land, and the remainder was not consecrated : the London County Council purchased part of the unconsecrated land under statutory powers. It was *held* that the payment off of a mortgage debt contracted by a previous vicar for the purchase of a vicarage house was an ecclesiastical purpose within sect. 19 of the Church Building Act, 1840 (3 & 4 Vict. c. 60) : *Ex parte London County Council, In re Christchurch, East Greenwich (Vicar)*, [1896] 1 Ch. 520.

(7) The ordinary has jurisdiction to grant a faculty authorising a portion of a consecrated cemetery or churchyard closed for burials by Order in Council to be used for widening a public street : so held by the Dean of Arches in *In re Bideford Parish, Ex parte Bideford (Rector)*, [1900] P. 314. In this case *In re Plumstead Burial Ground (supra)* was not followed, and the law on the subject generally was fully considered.

(8) In the following other cases faculties were granted for widening roads, &c., with consecrated ground : *Hove St. Andrew's, Vicar, &c. v. Mawson*, [1895] 1 P. 228, *n.* ; *In re St. Benet Sherehog, In re St. Nicholas Acons*, [1893] P. 66, *n.* ; *In re St. Nicholas Cole Abbey, In re St. Benet Fink*, [1893] P. 58 ; *St. Nicholas, Leicester, Vicar, &c. v. Langton*, [1899] P. 19.

(2.) Tenants in tail.

A tenant in tail selling under this section can bind his heirs and all other remaindermen other than the Crown. If the reversion in certain events passes to the Crown, the consent of the Crown must be obtained before the tenant in tail can sell.

Illustration.

The Earl of A. was, by Act of Parliament, tenant in tail of lands, the reversion in which passed, in certain events, to the Crown. He had agreed to sell the lands to a burial board, under the Lands Clauses Consolidation Act, 1845. The Board had paid the purchase-money into court. On a petition by the earl that the purchase-money might be invested and the proceeds paid to him, it was *held* that he could not sell without the consent of the Crown, which was not mentioned in the Act, but that he could bind his heirs in tail and all other remaindermen : *In re Cuckfield Burial Board* (1854), 19 Beav. 153.

(3.) Tenants for life.

NOTE.—See Settled Land Act, 1882 (45 & 46 Vict. c. 38), as to power of tenant for life to sell ; and Wolstenholme and Brinton's "Settled Land Acts."

- (a) The tenant for life, and not the remainderman, is entitled to enter into the contract for sale.

Illustration.

"In selling, the tenant for life alone contracts; and the persons entitled to the inheritance have nothing to do with fixing the price": *per* Knight Bruce, L.J., in *In re Browne, Ex parte Oxford and Bletchley Junction Ry.* (1852), 6 Rail. Cas. at p. 735. But *see* the following case:—A railway company bought land by agreement from a tenant for life, who purported to convey the whole of the fee to the company. It was *held* that the remainderman, on his estate accruing, was entitled to recover the land: *McNaghten v. Midland Great Western Ry.* (1861), 6 Ir. Jur. (N.S.) 138.

- (b) An infant is considered a tenant for life under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 59 and 60; but an infant equitable tenant for life cannot convey, without the trustees joining in the conveyance, when the legal estate is vested in the trustees.

Illustrations.

(1) A railway company desired to purchase certain lands the legal estate of which was vested in trustees. They agreed the price with the equitable tenant for life and paid the purchase-money into court. On a petition for the payment of the money to the tenant for life on his executing the conveyance, it was *held* that sect. 7 of the Lands Clauses Consolidation Act does not enable an equitable tenant for life to convey without the trustees joining in the conveyance where the legal estate is vested in the trustees: *Lippincott v. Smyth* (1860), 29 L. J. Ch. 520.

(2) A testator had devised lands to trustees upon trust to pay the income to A. for life to her sole and separate use, and after her decease in trust for such person as she should appoint. A. conveyed the property thus devised to B. absolutely. A railway company had agreed to purchase the lands from B., but refused to complete without the concurrence of the trustee (A. being still living). A bill was filed praying for specific performance, which was decreed, the trustees being ordered to join in the conveyance: *Hall v. London, Chatham and Dover Ry.* (1866), 14 L. T. 351.

- (c) If the special Act gives no power of compulsory purchase, but incorporates the Lands Clauses Act as to purchase by agreement, a tenant for life has power to sell or convey under this section.

Illustration.

The plaintiff was tenant for life of settled land, which he had agreed to sell to the committee of visitors of a county lunatic asylum. The agreement was made under the Lunatic Asylums Act, 1853, sect. 36 of which incorporates the provisions of the Lands Clauses Act as to purchases by agreement, but the Asylums Act gives the committee no powers of compulsory purchase:—*Held*, in an action by the vendor for specific performance, that a life tenant was entitled to sell under the incorporated clauses: *Devenish v. Brown* (1857), 26 L. J. Ch. 23.

- (d) If a tenant for life contracts with a railway company to sell portions of the settled estate and give immediate possession,

but the land is subject to certain leases and tenancies for years for which the company has to pay compensation, the company cannot, if the leases terminate during the lifetime of the tenant for life and the tenancies be void against his successor, deduct any part of the compensation from the purchase-money as against the remainderman.

Illustration.

A tenant for life contracted to sell parts of a settled estate to a railway company, and to give immediate possession. It appeared that the land was subject to a mining lease, of which there were thirteen years to run, to a surface lease with four years to run, and to tenancies from year to year, which had been overlooked by the vendor, and for which the company had to pay compensation :—*Held*, that “possession” meant actual occupation ; but the leases having expired before the death of the first tenant for life, and the remaindermen not being bound by the tenancies from year to year, the company had no equity, after the death of the first tenant for life, as against a tenant for life in remainder, to deduct the compensation paid by them from the purchase-money of the land : *North Staffordshire Ry. v. Lawton* (1863), 3 N. R. 31.

- (e) If a tenant for life without impeachment of waste after giving notice to a railway company of his intention to work minerals sells them to the company, he is not entitled to any portion of the purchase-money paid for the minerals. (*See also* sects. 69 and 74.)

Illustration.

A tenant for life without impeachment of waste had sold to a railway company certain minerals. He had given the company notice of his intention to work such minerals (under sect. 78 of the Railways Clauses Consolidation Act), and he could probably have worked out the whole of such minerals during his life :—*Held*, that he was not entitled to any portion of the compensation money ; that no apportionment could be made under sect. 69 of the Lands Clauses Consolidation Act ; and that sect. 74 did not apply : *In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

- (f) A tenant for life is not taking an unfair advantage of his position in stipulating that the company shall pay him 5 per cent. interest after purchase-money is paid into court until completion of the purchase, and no part of such interest will be considered to be capital.

Illustrations.

(1) Upon a sale of lands by a tenant for life to a railway company it was stipulated by the solicitor to the tenant for life that 5 per cent. interest should continue to be payable after the purchase-money had been paid into court and until completion of the purchase. The company's solicitor making no objection to is until more than a year afterwards :—*Held* that the company had acquiesced in the stipulation and were bound to pay such interest : *Ex parte Hardwicke (Earl)* (1852), 1 De G. M. & G. 297.

(2) H., the tenant for life of certain lands required by a railway company, contracted with the company to sell the land and to have 5 per cent. upon the purchase-money from May 10th, 1853, until the conveyance was executed. The company paid the purchase-money into the bank, but not the whole of the interest, and they raised the point whether the tenant for life, being empowered to sell on behalf of those entitled in remainder, was entitled to stipulate for his own benefit for so high a rate of interest as 5 per cent., and whether that, or the greater part, should not be invested and accumulated as capital:—*Held*, that the tenant for life had not taken unfair advantage of his position: *In re Hungerford, In re Rugby and Stamford Ry.* (1855), 1 Jur. (N.S.) 845.

- (g) A tenant for life cannot grant subsoil for a tunnel by way of easement, but can grant it as part of the “land.”

Illustration.

Part of the subsoil of settled land for the purposes of a tunnel cannot be granted by the tenant for life as an “easement” under sect. 3 of the Settled Land Act, 1882; but the Court has power under that section to authorise the sale as being a sale of part of the settled land: *In re Pearson's Will* (1900), 83 L. T. 626.

(4.) Married women.

NOTE 1.—*Vide* Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 61; the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 2; the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7; and the Dower Act, 1833 (3 & 4 Will. IV. c. 105).

NOTE 2.—The importance of sect. 7 of the Lands Clauses Act has been greatly lessened by the provisions of the Married Women's Property Act, 1882, whereby a married woman can, as a rule, convey to a purchaser without acknowledgment by her and without the concurrence of her husband: *In re Drummond and Davie*, [1891] 1 Ch. 524.

- (a) This section authorises the conveyance by a married woman seised in her own right.

Illustration.

Certain lands were in 1844 devised to A. for life with remainder to G. and his wife, their heirs and assigns for ever. In 1846 A. and G. and his wife purported to convey the land to a railway company by a deed made in pursuance of sect. 7 of the Lands Clauses Act, signed and delivered by the parties, but not acknowledged by G.'s wife:—*Held* (the point, however, not being essential to the decision of the case), that G.'s wife was “a married woman seised in her own right,” and that the conveyance was authorised by the section: *Cooper v. Gostling* (1863), 4 Giff. 449.

- (b) If after sale under this section the purchase price has been dealt with as money, it will be treated as personal estate.

Illustration.

Certain lands were in 1844 devised to A. for life, with remainder to G. and his wife, their heirs and assigns. In 1846 the land was purchased by a railway company, and the purchase-money was invested and the dividends paid to A. G. died, devising his real

estate to his wife for life, and after her death to their eldest son, S. G. He bequeathed his personal estate to his wife. G.'s wife died intestate as to real property, and bequeathed her personal estate to trustees upon certain trusts. Lastly, A., the tenant for life, died. S. G. claimed that the purchase-money retained the character of land :—*Held*, that it had been dealt with as money, and must be treated as personal estate : *Cooper v. Gostling* (1863), 4 Giff. 449.

- (c) Bare trustees for a married woman absolutely entitled to her separate use and not under any disability are not empowered to convey any more than if they had been bare trustees for a man.

Illustration.

A testator devised certain lands to trustees in trust for his wife for life, and after her death to transfer, assign, or otherwise assure the same to his two daughters in equal shares for their separate use as tenants in common. After the death of the tenant for life the trustees purported to sell to a railway company, under sect. 7 of the Lands Clauses Act; but one of the daughters was dissatisfied with the price, and applied for an injunction restraining the company from entering or using the property :—*Held*, that the trustees, being bare trustees for a married woman absolutely entitled to her separate use and not under any disability, were not empowered to convey, any more than if they had been bare trustees for a man : *Peters v. Lewes and East Grinstead Ry.* (1881), 18 Ch. D. 429.

- (d) Dower.—Where land in respect of which a widow is entitled to dower is sold, the Court will order the purchase price to be invested and one-third of the income to be paid to the widow.

Illustration.

A railway company had purchased certain freehold premises, which were subject to the dower of the owner's mother. The value of the premises was fixed at 500*l.*, and the Court ordered that this sum should be invested and one-third of the dividend paid to the dowress during her life : *In re Hall's Estate* (1870), L. R. 9 Eq. 179.

(5.) Guardians.

If a company takes possession of an infant's land under an informal award, that award is invalid unless ratified; but if the company continues in possession, and their power to take land is not extinguished, the Court will not necessarily interfere with their possession.

Illustration.

The plaintiff company had powers of acquiring land unlimited as to time. They took possession of certain lands of an infant, having obtained an informal award as to the amount of perpetual rent-charge to be paid for them. The award was repudiated by the owner on coming of age, but a varying rent continued to be paid. Disputes having arisen fifty-seven years after the company took possession, it was *held* that no ratification of the award could be implied under the circumstances, but, the powers of the company to acquire the land being still in existence, the Court *held* that the owner could not be permitted to interfere with the possession of the company : *Somersetshire Coal Canal v. Harcourt* (1857), 2 De G. & J. 596.

(6.) Committees of lunatics and idiots.

NOTE.—The Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 116 (2), provides, in the case of lunatics not so found by inquisition and certain persons of unsound mind, for the exercise of the powers of the committee of the estate of a lunatic, under order of the judge, “by such person in such manner and with or without security as the judge may direct,” either for a special case or generally until further order. By sect. 120 the judge may by order authorise and direct the committee of the estate of a lunatic to sell or otherwise deal with the property of the lunatic.

- (a) This section only authorises the sale of the land required, belonging to a person of unsound mind, by his committee, and the sanction of the judge in lunacy must first be obtained.

Illustrations.

(1) The committee of a lunatic is bound to obtain the leave of the Court before proceeding to a sale of any part of the lunatic's estate for the purpose of raising money with which to redeem the land-tax : *In re Wade* (1849), 1 H. & Tw. 202.

(2) The committees of the person and estate of G. L. agreed to sell certain land to a railway company. A reference was made to the Master to report whether the contract was proper and beneficial. The Master reported in favour of the contract and the purchase-money was directed to be invested in Consols in the joint names of the committees and the railway company *In re Taylor and York and North Midland Ry.* (1849), 1 Mac. & G. 210.

(3) The committee of a lunatic has no power to consent to an Act of Parliament which regulates the mode in which a railway company is authorised to take a part of the lunatic's land : *per* Lord Cottenham, C., in *In re Brown* (1849), 1 Mac. & G. 201.

(4) Sect. 7 of the Lands Clauses Act does not enable a lunatic to sell property or to convey it to a company having power to take it ; it only enables the committee of a lunatic to convey : *In re Tugwell* (1884), 27 Ch. D. 309.

- (b) The Court can sanction the discharge of lands from an annuity charged thereon for the benefit of a lunatic, as such an annuity is land within the meaning of the section.

Illustration.

The Metropolitan Board of Works desired to acquire, for a street improvement, certain freehold premises charged with an annuity of 50*l.* for the benefit of a lunatic. The Board offered to purchase a Government annuity of 50*l.* as compensation. The committee of the lunatic petitioned that this might be sanctioned :—*Held*, that the annuity was a hereditament and within the clause as to “lands,” which the committee could sell with the sanction of the Court. The Court could in lunacy direct the purchase of a Government annuity, and therefore the petition could be complied with : *In re Brewer* (1875), 1 Ch. D. 409.

- (c) A conveyance by a committee under this section does not convert real into personal estate, and the purchase-money will descend to the heir.

Illustration.

The Corporation of the City of London were desirous of acquiring certain land, the property of a person of unsound mind not so found, for the purposes of the Clerkenwell Improvement Act, 1851, in which were incorporated the provisions of the Lands Clauses Act as to sale by agreement. An uncle of the owner purported to negotiate on her behalf, and the price was fixed and the purchase-money paid into court. The corporation took possession, and the purchase-money was invested by order of the Court and the dividends applied for the benefit of the owner. On the death of the latter the heir claimed the fund, on the ground that there could have been no conversion, as the lunatic could not have assented to it:—*Held*, overruling *Ex parte Flamank, In re East Lincolnshire Ry. Act* (1851), 1 Sim. (N.S.) 260, that the heir was entitled: *In re Tugwell* (1884), 27 Ch. D. 309.

(7.) Trustees, mortgagees, and receivers.

- (a) A sale under this section may under certain circumstances be an exercise of a power of appointment, or of a power of sale, if such be annexed to the trust.

Illustrations.

(1) Lands were settled to such uses as M. and his son should by deed appoint, and, subject thereto, to M. and his son successively for life, with remainders over to the sons of the son in tail. A railway company having power to take the lands comprised in the settlement, M. and his son contracted to sell to them a part, and the company were allowed to take possession on an agreement that the amount of compensation should be settled either by arbitration or a jury, as M. should desire. The company also paid a sum of money to M. expressly on account of the compensation money to be afterwards fixed. M. died before anything further was done:—*Held* that, in these circumstances, there was no contract the specific performance of which the Court could enforce or aid in carrying into effect as a defective execution of the joint power of appointment, at the instance of the son and against the parties entitled in remainder under the settlement: *Morgan v. Milman* (1853), 3 De G. M. & G. 24.

(2) Under a marriage settlement certain lands stood limited to and for such uses and interests as D. should appoint by deed, and subject thereto and to his right to appoint by will to his issue or among them, to the use of D. and the heirs of his body, with remainder over. D. appointed part of the lands by deed, and he had an absolute title to certain other lands. In 1866 a railway company required to purchase part of the land not yet appointed by D. and part of that to which he was absolutely entitled. An agreement was thereupon come to between D. and two of the directors of the company by which, after a recital that D. was absolutely entitled to the lands described in the schedule thereto, and that it had been agreed to refer the matter of purchase-money and compensation to arbitration, the parties bound themselves to abide by the award to be made. The schedule contained a description of the lands required by the company, but did not distinguish the titles under which they were respectively held. A single sum was awarded to D. as the purchase-money for the whole, and, before any conveyance had been executed, D. died:—*Held*, that the agreement operated in equity as an execution of the power of appointment, and that the purchase-money was payable to the legal personal representative of D. as part of his personal estate: *In re Dyke's Estate* (1869), L. R. 7 Eq. 337.

(3) On May 3rd, 1881, the trustees of the will of W. C. entered into an agreement with the L. School Board to sell to them a piece of land, under a power of sale contained in the will, which power was to last for a period of twenty-one years from the testator's death; this

happened on December 1st, 1866. The Board objected that if all the persons beneficially entitled were *sui juris*, the power of sale was gone, and required that these persons should join in the conveyance. The vendors declined to comply with this requisition :—*Held*, that the power could be exercised by the trustees after the property had become absolutely vested in persons who were *sui juris*, as on the construction of the instrument it appeared to be the intention of the settlor or testator that it should be thus exercised, provided that the power, in its creation, did not contravene the rule against perpetuities, and that the beneficiaries had not put an end to the power and the trusts by electing to take the property as it stood : *In re Cotton's Trustees and School Board for London* (1882), 19 Ch. D. 624.

- (b) When trustees profess to convey under the Lands Clauses Act, the validity of the sale must be determined without reference to the existence or non-existence of a power of sale contained in the will under which they hold the property.

Illustrations.

(1) By a settlement, made in 1843, certain lands were granted to the use of P. for life, with remainders over, and the trustees were to have a power of sale with the consent in writing of the tenant for life. A railway company gave notice to treat as to part of the lands in question to the trustees, and also to P. and to J., the persons interested. The question of compensation was referred to arbitration, and one sum was awarded to P. and J. as purchase-money and compensation. The trustees took no part in the reference :—*Held*, that the sale was merely one by the tenant for life under the Lands Clauses Act, and that the trustees were not bound to convey : *In re Pigott and Great Western Ry.* (1881), 18 Ch. D. 146.

(2) A testator devised lands, as to which a notice to treat had been given before his death, to trustees upon certain trusts with a power of sale, “for the purpose of division.” The trustees purported to sell the lands to the company under the Lands Clauses Act. The *cestui que trust* disputed the sale :—*Held*, that as the trustees had professed to sell under the Lands Clauses Act, the validity of the sale must be determined without reference to the existence or non-existence of a power of sale under the will : *Peters v. Lewes and East Grinstead Ry.* (1881), 18 Ch. D. 429.

(3) Where the question was whether, when there is an uncompleted contract for sale existing at the time of a person's death, it was right to make an order under the Trustee Act vesting that property in another on the footing that the deceased person was a trustee of the property :—*Held*, that the Court had no jurisdiction to make such an order, unless specific performance of the contract had been decreed or the contract had been executed by payment of the purchase-money to the vendor : *In re Colling* (1886), 32 Ch. D. 333 ; questioning *In re Lowry's Will* (1872), L. R. 15 Eq. 78.

- (c) A mortgagee who is not a party to the assessment of compensation for land over which he has a mortgage, is not bound by it.

Illustration.

A railway company were desirous of purchasing certain lands subject to an equitable mortgage. They paid a sum into court, gave bonds to the owner and his mortgagees, and took possession. The amount of compensation was then determined by an inquiry, of which the mortgagees received no formal notice, and which they did not attend. The

compensation was assessed at less than the sum in court, and less than the mortgage debt :—*Held*, that the sum paid into court was merely security for the payment of whatever might be found due, and that the mortgagees were not entitled to be paid out of it. Also, that the mortgagees were not bound by the result of the inquiry, and were entitled, in default of payment, to an assignment of the land comprised in their security : *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501.

- (d) The leave of the Court is required before land which is in the possession of a receiver can be taken.

Illustration.

Where a railway company, without leave of the Court, proceeded under the Lands Clauses Act to take possession of certain land which was in the possession of a receiver appointed by the Court, an injunction was granted to restrain them : *Tink v. Rindle* (1847), 10 Beav. 318.

- (e) When the consent of the Charity Commissioners to payment of purchase-money to a charitable corporation is required.

Illustrations.

(1) The consent of the Charity Commissioners is not required for the sale of a ward charity school wholly supported by voluntary contributions : *Finnis to Forbes, Ex parte Finnis* (No. 2) (1883), 24 Ch. D. 591.

(2) A piece of land belonging to the Clergy Orphan Corporation was taken by a railway company under a special Act. The purchase-money was agreed at 40,000*l.*, and 5,000*l.* of this was paid into court. The land in question had been purchased by the corporation under a special Act, which, however, contained no power to sell or let land purchased. The land had been bought with money representing voluntary contributions. A petition having been presented for the payment out of the 5,000*l.*, the Charity Commissioners opposed on the ground that the fund represented land which there was no power to sell without the consent of the Commissioners :—*Held*, upon the construction of sects. 62 and 66 of the Charitable Trusts Act, 1853, that the money used by the corporation for the purchase was exempt from the jurisdiction of the Charity Commissioners, and the fund in Court was ordered to be paid out to the corporation : *In re Clergy Orphan Corporation*, [1894] 3 Ch. 145.

- (8.) Executors and administrators.

An executor who has no estate or interest in land, but only a power to sell it, cannot under this section grant an easement over it.

Illustration.

A testator appointed E. and others to be the executors and trustees of his will, and charged all his estate, both real and personal, with the payment of his funeral and testamentary expenses and also the pecuniary legacies given by his will, authorising his trustees, if the personalty proved to be insufficient, to raise the deficiency by a mortgage or mortgages of all or any part of his residuary estate. The testator then devised the residue of his freehold estate to W. By an agreement between a municipal corporation and E., who was then sole surviving trustee and executrix, after reciting that the

corporation were applying for powers to make additional waterworks, E. contracted to sell the fee simple in 93 acres of land belonging to the estate, including a certain term, and also the right to lay down and maintain a line of pipes through parts of the estate. The corporation duly obtained the required powers. It was objected that E. took no estate in the residuary realty and did not possess any power of sale under the will or otherwise, and, further, that he had no power to grant easements. The Act obtained by the corporation contained a clause enabling persons empowered by the Lands Clauses Act to sell and convey or release lands to grant any easement, right, or privilege required for the purposes of the Act:—*Held*, that E. was, nevertheless, not empowered by sect. 7 of the Lands Clauses Act and the private Act, taken together, to grant an easement to the corporation: *In re Barrow-in-Furness Corporation and Rawlinson's Contract* (1903), 72 L. J. Ch. 233.

(9.) All persons entitled to the receipt of rents and profits.

- (a) If a company take a lessee's interest they are bound to indemnify the lessee against subsequent breaches of covenants, but the lessee remains liable for breaches committed before the notice to treat.

Illustrations.

(1) "I am of opinion that as soon as the land is required for the purposes of the railway, and notice is given to take it under the Act, the licence to assign is no longer required, being virtually taken away by the clause of the Act of Parliament [the Lands Clauses Act], as is laid down in an analogous case in *Wadham v. Marlowe*, 8 East, 314, *n*. The lessor can neither refuse the licence to assign nor assent to the assignment, for he has nothing more to do with it": *per* Lord Romilly, M.R., in *Slipper v. Tottenham and Hampstead Junction Ry.* (1867), L. R. 4 Eq. at p. 114.

(2) D. granted a long lease of property to B. and covenanted for himself and his assigns not to permit any messuage to be built on a certain paddock. The L. Railway Co. acquired the paddock under their compulsory powers and built a station thereon. B. brought an action for breach of the covenant:—*Held*, that the company were assignees of the land by compulsion of law, and that D. was discharged from his covenant by the Act which put it out of his power to perform it; and that it made no difference whether the company were required or merely empowered by their Act to build the station: *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180.

(3) H. leased a house to the E. Union for twenty-one years, terminable by either side after seven or fourteen years. Notice to treat was given to H. and to the union by the M. Railway Co. An award was made in the case of the union and the purchase-money paid. Nothing was done as to H.'s interest. H. brought an action against the union for breach of a covenant; this action was referred to an arbitrator. On a case stated by him it was *held* that the union were liable for breaches of the covenant down to the time of the execution by the union of the conveyance to the company: *Mills v. East London Union* (1872), L. R. 8 C. P. 79.

(4) "As to the abstract principle, I have no doubt that a company purchasing a leasehold interest as this company has done is bound to take an assignment, and bound to enter into an engagement to indemnify the vendor against the covenants of his lease. It would be a grievous injustice to take property by force from a man who was unwilling to dispose of it, and to leave him subject to a substantial rent of 600*l.* a year and to the other covenants and conditions of his lease": *per* Lord Hatherley in *Harding v. Metropolitan Ry.* (1872), L. R. 7 Ch. at p. 159.

- (b) The company may not be bound to treat with the lessor, but they cannot disregard his interest.

Illustration.

Ejectment was brought by the owner in fee of lands against a railway company and the tenant of the lands, to whom the owner had leased them for thirty years, with a clause against alienation or underletting. The tenant assigned a part to the company to enable them to lay certain water-pipes, and the company had paid compensation to the tenant for this. They had no dealing with the owner, but he required compensation also, which the company refused. The owner then brought ejectment for forfeiture :—*Held*, that the company were not bound to treat as to the fee, but that they could not disregard the interest of the lessor : *Legg v. Belfast and Ballymena Ry.* (1850), 1 Ir. C. L. R. 124, *n*.

Parties under Disability to exercise other Powers.

8. The Power hereinafter given to enfranchise Copyhold Lands, as well as every other Power required to be exercised by the Lord of any Manor pursuant to the Provisions of this or the Special Act, or any Act incorporated therewith, and the Power to release Lands from any Rent, Charge, or Incumbrance, and to agree for the Apportionment of any such Rent, Charge, or Incumbrance, shall extend to and may lawfully be exercised by every Party hereinbefore enabled to sell and convey or release Lands to the Promoters of the Undertaking.

Amount of Compensation in case of Parties under Disability to be ascertained by valuation and paid into the Bank.

9. The Purchase Money or Compensation to be paid for any Lands to be purchased or taken from any Party under any Disability or Incapacity, and not having Power to sell or convey such Lands except under the Provisions of this or the Special Act, and the Compensation to be paid for any permanent Damage or Injury to any such Lands, shall not, except where the same shall have been determined by the Verdict of a Jury, or by Arbitration, or by the Valuation of a Surveyor appointed by Two Justices under the Provision herein-after contained, be less than shall be determined by the Valuation of Two able Practical Surveyors, one of whom shall be nominated by the Promoters of the Undertaking, and the other by the other Party, and if such Two Surveyors cannot agree in the Valuation, then by such Third

Surveyor as any Two Justices shall upon Application by either Party, after Notice to the other Party, for that Purpose nominate; and each of such Two Surveyors if they agree, or if not then the Surveyor nominated by the said Justices, shall annex to the Valuation a Declaration in Writing, subscribed by them or him, of the Correctness thereof; and all such Purchase Money or Compensation shall be deposited in the Bank for the Benefit of the Parties interested, in manner herein-after mentioned.

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I. Surveyors.

(a) Trustees cannot, under this section, appoint one of themselves as surveyor; but the fact that a surveyor (under sect. 85) has at an earlier date been in the employ of the company is not necessarily an objection.

Illustrations.

(1) The G. N. Railway Co., acting under sect. 85 of the Lands Clauses Act, took possession of a piece of land required for the purposes of the railway. A motion was made on behalf of the owners of the land for an injunction upon the ground (*inter alia*) that the surveyor appointed under sect. 85 had, at an earlier date, been in the employ of the company, and, in that character, had valued the land:—*Held*, that this afforded no adequate ground for granting the injunction: *Langham v. Great Northern Ry.* (1847), 16 L. J. Ch. 437.

(2) A railway company was treating with trustees for the purchase from them of certain lands. The trustees appointed one of themselves as surveyor under sect. 9 to fix the *minimum* price. One of the *cestuis que trustent* objected to the price:—*Held*, that the section intended to impose a check upon the person upon whom the power of sale was conferred, and did not authorise him to appoint himself: *Peters v. Lewes and East Grinstead Ry.* (1881), 18 Ch. D. 429.

(b) If there is no valuation or no declaration in writing by the surveyors as required by the section, the promoters cannot obtain specific

performance. But if the *promoters* do not require such valuation it may be dispensed with in a suit for specific performance by the vendor.

Illustrations.

(1) The defendants had no power to sell save under the Lands Clauses Act, but the plaintiff company, whose Act incorporated the Lands Clauses Act, had agreed with them for the purchase of certain land. A dispute arose as to the meaning of the agreement, and the company applied for specific performance. There was no valuation by two surveyors, in accordance with sect. 9, and specific performance was refused: *Wycombe Ry. v. Donnington Hospital* (1866), L. R. 1 Ch. 268.

(2) Action for specific performance of an agreement by a railway company for the purchase of land from a dean and chapter. The amount of purchase-money had been agreed upon between the parties, but had not been determined by surveyors according to sect. 9 of the Lands Clauses Act:—*Held*, that as the defendants, who were the only parties interested in requiring sect. 9 to be complied with, did not require the valuation, it might be dispensed with: *Ely (Dean) v. Peterborough, Wisbech and Sutton Ry.* [1869] W. N. 201.

(3) The defendant had agreed with the plaintiff company (in whose Act the Lands Clauses Act was incorporated) for the sale to them of certain settled lands of which he was tenant for life. There was no declaration in writing, as to the value, by two surveyors, in accordance with sect. 9 of the Lands Clauses Act, and the defendant requested the company to nominate their surveyor. They applied for specific performance:—*Held*, that they could not obtain it, the provisions of the section not having been complied with, and the vendor being therefore unable to give a good title: *Bridgend Gas and Water Co. v. Dunraven* (1885), 31 Ch. D. 219.

(c) If the promoters will neither appoint a surveyor nor complete the contract the Court will order an inquiry as to whether the agreed price is reasonable and proper.

Illustration.

E. B. (a tenant for life) contracted with a railway company for the sale of certain lands and appointed a surveyor under sect. 9 of the Lands Clauses Act. The company would neither appoint their valuer nor complete the contract. The Court therefore directed an inquiry as to whether the agreed price was reasonable and proper: *Baker v. Metropolitan Ry.* (1862), 31 Beav. 504. "If two persons enter into a contract, which is valid, provided certain rules imposed by the Legislature are afterwards satisfied, in such cases contracts are perfectly good, and the fact that subsequently there are certain formalities to be gone through for the purpose of showing that it is a good contract does not in the slightest degree affect its validity": *per* Romilly, M.R., at p. 507, *ib.*

(d) If one surveyor has been appointed to act for both parties the Court will require an affidavit by a second surveyor that the price is sufficient.

Illustration.

The predecessor of the petitioner had sold a portion of the glebe to a railway company, authorised to acquire it, for 160%. One surveyor only had been employed, and had acted for both parties. The purchase-money had been paid into the bank. The Court granted

a petition for the investment, subject to the filing of an affidavit by a surveyor, to be appointed by the petitioner, that the price was sufficient: *Ex parte Adderley (Rector)* (1863), 10 L. T. 131.

(c) Parties may agree to sell at a price to be fixed by two surveyors, afterwards adopting that price.

Illustration.

A contract to sell at a price to be fixed by two surveyors is not *per se* enforceable, but if the surveyors fix the price, and then, the price being fixed, the parties approve of it, it is an exact compliance with the Act of Parliament—that is, they have approved of the price, and they sell for not less than the price: *Peters v. Lewes and East Grinstead Ry.* (1881), 18 Ch. D. 429 at p. 437.

II. Jury.

If there is a right to have a jury summoned, the neglect to do so by the company will render them liable to an action for damages.

Illustration.

“Wherever a statute gives a right to one person to have an act fulfilled by another, and that other does not fulfil it, a cause of action arises. It is clear that within the principle of *Ashby v. White*, 1 Sm. L. C., there was here a duty on the company to issue a warrant to the sheriff, a breach of which would give to the plaintiff a right of action, and there is therefore in this case a substantive cause of action for damages, if that were really necessary”: *per* Erle, C.J., in *Fotherby v. Metropolitan Ry.* (1866), L. R. 2 C. P. at p. 194.

III. The section applies to compensation for injuriously affecting land as well as to compensation for not taking land.

Illustration.

“Sect. 9 . . . clearly includes cases of compensation for damage as well as of purchase-money. For I cannot at all agree with the suggestion . . . that the words in sect. 9, ‘compensation to be paid for any permanent damage or injury to any such lands,’ may mean compensation for injury done to mines or anything of that sort. It appears clear to me that they relate to any lands belonging to parties under disability”: *per* Amphlett, J.A., *Stone v. Yeovil Corporation*, 2 C. P. D. 99 at p. 117.

NOTE.—The 68th section also relates to compensation for damages claimed by persons under disability as well as to such compensation claimed by owners in fee.

Illustration to Note.

“The 68th section does not, in so many words, say that a tenant for life shall be on the same footing as a tenant in fee, and that he can get compensation, not for himself only, but for those who shall succeed him; but that is to be inferred from the next section, which relates to what is to be done with the purchase-money. That section relates not only to purchase-money of land from a sale, but provides also for the compensation to be paid for any permanent damage done to any such land. The inference, therefore, is that

any tenant for life is as much able to bargain for any such permanent damages as or purchase-money": *per* Amphlett, J.A., in *Stone v. Yeovil Corporation (supra)*.

Where Vendor absolutely entitled. Lands may be sold on chief Rents.

10. It shall be lawful for any Person seised in Fee of, or entitled to dispose of absolutely for his own Benefit, any Lands authorized to be purchased for the Purposes of the Special Act to sell and convey such Lands or any Part thereof unto the Promoters of the Undertaking in consideration of an annual Rent-charge payable by the Promoters of the Undertaking, [*but, except as aforesaid, the Consideration to be paid for the Purchase of any such Lands, or for any Damage done thereto, shall be in a gross Sum*].

NOTE.—The words in italics are repealed by 23 & 24 Vict. c. 106; but the powers given by this section are extended to all cases of sale, &c., where the parties interested in such sale or entitled to such compensation are under disability or incapacity, and have no power to sell or convey such lands or receive such compensation except under the provisions of this Act: 23 & 24 Vict. c. 106, s. 2.

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(a) An agreement between the promoters and a third person (*e.g.*, a contractor), to pay him by a rent-charge for land which for a sum of money he has acquired from the owner, is good although the owner transfers directly to the promoters. But an agreement to pay a rent-charge for sums expended in other ways is invalid, as also is the payment of any periodic sum, not in the nature of rent, in lieu of uncertain damages.

Illustrations.

(1) An agreement between a railway company and their contractor provided that if any landowner was unwilling to sell to the company in consideration of a rent-charge, the contractor should purchase for money and re-sell to the company, who should grant a rent-charge to the contractor. These rent-charges were of two kinds. In one class the contractor agreed with the landowner for the purchase of the land, and paid the purchase-money to the vendor, who conveyed to the company, and the company then by a subsequent deed, granted a rent-charge to the contractor calculated on the amount so paid. In the other class of cases the rent-charges were granted generally in respect of sums paid by the contractor for the purposes of the company :—*Held*, that the rent-charges of the first kind were good, the substance of the case being that the contractor purchased and took the land and sold it to the company, the conveyance direct to the company being merely to avoid circuitry. The rent-charges of the second kind, however,

were invalid, as it did not appear that the money was paid by the contractor to any person who was selling to the company as an owner in fee, or whether such money was purchase-money or other compensation—*e.g.*, for injuriously affecting lands, surveyors' fees or the like : *In re Manchester and Milford Ry.* (1880), 15 L. J. Notes of Cases, 47.

(2) Where by an award under the Canadian Railway Act, 1868, arbitrators awarded against a railway company as damages for expropriated land "the sum of \$35,013 *plus* \$100 per month from this date, payable on the first of each month until the said company shall have set free the watercourse serving to drain the quarries adjacent to the expropriated land and constructed a culvert to protect the said watercourse" :—*Held*, that the award was void, upon the face of it, as to the monthly payment directed, which was not rent, but in the nature of an assessment of damages payable *in futuro*, contingent on a future event and therefore uncertain ; and also in respect of the direction to construct a culvert, as it was not within the functions of the arbitrators to prescribe how the company was to fulfil its statutory obligations : *Bourgoin v. Compagnie du Chemin de Fer de Montréal Ottawa et Occidental* (1880), 5 App. Cas. 381.

(b) A rent charged on the water rate levied by a corporation may be a rent-charge.

Illustration.

C. granted an easement in perpetuity to the Corporation of L. in consideration of a yearly rent, which ultimately vested in G. G.'s predecessor in title sold to the corporation certain lands and easements in consideration of a yearly rent. No power of distress was reserved. There were covenants by the corporation to pay the rents on the days and in manner provided. The easements and lands were required for the purposes of a Waterworks Act, sect. 3 of which provided that "the persons empowered by" the Lands Clauses Act "to convey lands shall have full power to convey or grant in perpetuity at an annual or other rent any lands for the purposes of this Act." The Act incorporated the Lands Clauses Act. The rents were described in a contract for sale as "an aggregate yearly rent-charge . . . payable in perpetuity by the Corporation of L., secured by covenants of the corporation, and by a statutory charge on the rates leviable by the corporation" :—*Held*, that the rent was by virtue of sect. 11 of the Lands Clauses Act charged on the water rates leviable by the corporation and was therefore aptly described as a "rent-charge" : *In re Lord Gerard and Beecham's Contract*, [1894] 3 Ch. 295.

Payment of Rents
to be charged on
Tolls.

11. The yearly Rents reserved by any such Conveyance shall be charged on the Tolls or Rates, if any, payable under the Special Act, and shall be otherwise secured in such Manner as shall be agreed between the Parties, and shall be paid by the Promoters of the Undertaking as such Rents become payable ; and if at any Time any such Rents be not paid within Thirty Days after they so become payable, and after Demand thereof in Writing, the Person to whom any such Rent shall be payable may either recover the same from the Promoters of the Undertaking, with Costs of Suit, by Action of Debt in any of the Superior Courts, or it shall be lawful for him to levy the same

by Distress of the Goods and Chattels of the Promoters of the Undertaking.

NOTE.—The powers given by this section are extended to all cases of sale, &c., where the parties interested in such sale or entitled to such compensation are under any disability or incapacity and have no power to sell or convey such lands or receive such compensation except under the provisions of this Act : 23 & 24 Vict. c. 106, s. 2.

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I. Charge on land.

(a) If the rent-charges are charged upon the whole undertaking and issue out of the land conveyed, the holders have a first charge on the land comprised in the deeds of charge, and are entitled to have their rent-charges paid out of the net earnings of the company in priority to debenture-holders.

Illustration.

The plaintiff and others had sold to the defendant company lands required by the company for their line, and had received yearly rent-charges charged upon the whole undertaking of the company and issuing out of the lands comprised in the respective indentures of conveyance. The company being in financial difficulties and the plaintiff having filed a bill, it was declared that the holders of the rent-charges were entitled to be paid, among themselves, *pari passu*; that they had priority over the debenture-holders, having a first charge on the lands sold by them and on the net earnings of the company, but that they had no charge on the other lands of the company: *Eyton v. Denbigh, Ruthin and Corwen Ry.* (1869), L. R. 7 Eq. 439. The following was the declaration made in this case:—"That the owners of the several rent-charges mentioned in the chief clerk's certificate are entitled to a charge upon all the lands of the company comprised in their several deeds of charge and upon all the earnings and profits of the undertaking of the company, in priority to all other the creditors of the company, and that they are, as between themselves, entitled to be paid such rent-charges *pari passu*. And that the holders of the several mortgage debentures mentioned in the chief clerk's certificate are entitled to a charge upon all the profits of the undertaking of the company, in priority to all the other creditors of the company, except owners of the said rent-charges, and that they are, as between themselves, entitled to such charges *pari passu*."

(b) If the rent-charge is specified to be enforceable by re-entry the holder may enter even though a receiver of the undertaking has been appointed by the Court.

Illustration.

P. agreed with a railway company for the sale of certain land required by the company in consideration of a rent-charge : and the land was conveyed to the use that the grantor might receive the rent-charge, and to the further use that if it should be in arrear, he might make entry upon the lands and, "subject as aforesaid, to the use of the company." An order was afterwards made appointing a receiver of the undertaking, and an inquiry was directed as to what sum was due to P. in respect of his rent-charges :—*Held*, that the agreement had been made in conformity with the Lands Clauses Act, and that P. had the right to enter upon the land, notwithstanding the appointment of a receiver : *Forster v. Manchester and Milford Ry.* (1880), 49 L. J. Ch. 454.

II. Distress.

(a) If there is in the conveyance no power of distress, a distress can be levied in default of payment under 4 Geo. II. c. 28, s. 5.

Illustration.

Under the powers conferred by the Liverpool Corporation Waterworks Act, 1855, in which was incorporated the Lands Clauses Act, a limited owner sold to the Liverpool Corporation an easement for a perpetual rent. The rent, being for sale, was described as a "rent-charge," though no power of distress was given by the conveyance. The purchaser objected that it was not a rent-charge :—*Held* that, being a rent, distress could be levied. In default of payment, under 4 Geo. II. c. 28, s. 5, and that (such a sale being sanctioned by the Waterworks Act) the rent reserved was by sect. 11 of the Lands Clauses Act charged upon the water rates levied by the Corporation : *In re Lord Gerard and Beecham's Contract*, [1894] 3 Ch. 295 (see *ante*, p. 98).

(b) If the conveyance gives the holder of the rent-charge a power to distrain, the Court may give him leave to distrain, though other holders of rent-charges have obtained the appointment of a receiver.

Illustration.

The plaintiff had sold certain lands to the defendant company in consideration of a rent-charge, and a receiver had been appointed by the Court in an action by the plaintiff on behalf of herself and all other persons entitled to rent-charges who should come in and contribute to the expenses of the suit. Another owner of a rent-charge applied for leave to distrain on the land conveyed by him :—*Held*, that he could not be prejudiced by the action brought by other owners of rent-charges, and leave was given : *Eyton v. Denbigh, Ruthin and Corwen Ry.* (1868), L. R. 6 Eq. 14.

(c) But if the company has conveyed its superfluous lands, plant, and rolling stock to trustees for the benefit of its creditors, and a receiver has been appointed thereunder, the Court will not give an owner of a rent-charge leave to distrain upon goods expressly conveyed to the trustees.

Illustration.

A railway company which had purchased a considerable amount of land in consideration of annual rent-charges had assigned to trustees for the benefit of creditors its superfluous

lands, rolling-stock, plant, &c. A creditor's action had been brought for the administration of the trusts of the deed of assignment, and a receiver had been appointed. A vendor of land to the company, whose rent was in arrear, applied in the creditor's action for leave to distrain in that suit. The Court refused to allow him to take goods which had been expressly conveyed to the trustees, or to take locomotives passing over his land : *Eyton v. Denbigh, Ruthin and Corwen Ry.* (1868), L. R. 6 Eq. 488.

(d) The actual railway, from its mode of annexation to the land, is a fixture, and not distrainable.

Illustration.

C.'s father demised certain coal mines to B. for eighty-five years, with power to construct and use all necessary railways. B.'s successors in title granted to C. a power of distress for non-payment of royalties, and afterwards demised part of the mines to O. with power to construct and use railways. O. mortgaged his term to T., who entered into possession of the mine and of three railways connected with it. C. distrained for rent (*inter alia*) on the three railways. The railways were constructed by bringing the ground to a dry and uniform surface by the use of ballast; on this the sleepers were laid, and the rails were fastened to the sleepers by nails, and the sleepers were then embedded in ballast. In removing the rails they had to be wrenched off from the sleepers. To remove the sleepers the ballast had to be loosened and the sleepers raised by means of levers :—*Held*, that the railways were so annexed to the freehold as to become fixtures, and were not liable to be distrained for rent : *Turner v. Cameron* (1870), L. R. 5 Q. B. 306.

(e) The holder of a rent-charge is not entitled to double costs under 11 Geo. II. c. 19, s. 22. (11 Geo. II. c. 19, s. 22, is repealed by 46 & 47 Vict. c. 49, s. 4; see also 56 & 57 Vict. c. 61.)

Illustration.

By a canal Act a company was authorised to take certain lands for the purposes of the Act, on making certain payments, either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even when off the premises, in case of non-payment of such sums. An avowant, stating a distress under this Act of Parliament, was not entitled, upon obtaining a verdict, to double costs under the stat. 11 Geo. II. c. 19, s. 22 : *Leominster Canal Navigation v. Norris* (1798), 7 T. R. 500.

III. Judgment creditors.

Sect. 4 of the Railway Companies Act, 1867, protects the rolling-stock and plant of a railway from seizure after the railway is open for the public, and continues its protection if the railway is afterwards closed for traffic, and even if the company is in such a position that it can never use its rolling-stock or plant again.

Illustrations.

(1) The 4th section of the Railway Companies Act, 1867, not only takes away from the judgment creditor of a railway company the right of taking in execution the rolling-stock and plant of such a company, but gives him entirely new rights, which are independent of the fact whether such company has or has not rolling-stock or plant to be

taken in execution : *In re Manchester and Milford Ry., Ex parte Cambrian Ry.* (1880), 14 Ch. D. 645. Wherever the judgment creditor of a railway company is unpaid, the appointment of a receiver or manager is a matter of right, *ib.*

(2) The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act, 1867, s. 4, to the rolling-stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic : *Midland Waggon Co. v. Potteries Ry.* (1880), 6 Q. B. D. 36. "It seems to me that the meaning of the section is that it was intended that the creditors should not be able to seize the rolling-stock or plant after the railway company has once become a going concern. Even in the extreme case, that of a company which is in such a position that it can never use its rolling-stock or plant again, still they are protected as being within the very words of the statute" : *per* Pollock, B., at p. 40, *ib.*

Power to purchase Lands required for additional Accommodation. **12.** In case the Promoters of the Undertaking shall be empowered by the Special Act to purchase Lands for Extraordinary Purposes, it shall be lawful for all parties who, under the Provisions hereinbefore contained, would be enabled to sell and convey Lands, to sell and convey the Lands so authorized to be purchased for extraordinary Purposes.

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(a) Sects. 12 and 13 were passed to enable promoters to acquire land which at the time of the passing of the special Act was not supposed to be required for the undertaking.

Illustration.

A railway company had acquired by agreement certain lands which had not at the time of action been used for any purpose of the company, though it was apparent that they might be required. The time specified by sect. 127 of the Lands Clauses Act for the sale of superfluous lands had expired :—*Held*, that the lands were not "superfluous lands," and that sects. 12 and 13 were passed for the purpose of enabling promoters to acquire land which at the time of the passing of the special Act was not supposed to be required for the undertaking : *Hooper v. Bourne* (1877), 3 Q. B. D. 258. Affirmed, on the question of "superfluous land," 5 App. Cas. 1. "It seems to me that where a company are empowered to take lands compulsorily no distinction can be drawn between those lands which they take, not by having recourse to their compulsory powers, but by agreement, the owner knowing that if he does not agree he will be forced to part with them, and those lands which are taken without any agreement, the owner opposing and obstructing every proceeding of the company ; the same principle applies in all the cases which I have alluded to" : *per* Lord Bramwell at p. 273, *ib.*

(b) If a railway company is compelled to take the whole of a house or other building or manufactory, under sect. 92, part of which is outside the line of deviation, it cannot afterwards allege that the contract to take the whole was *ultra vires*.

Illustration.

"The contract was not necessarily and on the face of it *ultra vires*. If the land in question was really wanted by the appellants for what are called extraordinary purposes, they were authorised to purchase it. Besides, the line of deviation actually cuts the respondent's house in two, and in such circumstances the appellants had no right to take a part without taking the whole if the plaintiff required them to do so, and it is a reasonable inference that the contract to purchase the whole was made because, wanting what was within the limits of deviation, the directors knew that they could not stop short with what was within those limits. Be that, however, as it may, there was nothing to show the respondent that his land was not wanted for the legitimate objects of the company, and in such a case it cannot be permitted to the directors to allege that the contract was invalid as being beyond their powers": *per* Lord Cranworth, C., in *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. C. at p. 349.

Authority to sell
and re-purchase
such Lands.

13. It shall be lawful for the Promoters of the Undertaking to sell the Lands which they shall have so acquired for extraordinary Purposes, or any Part thereof, in such Manner, and for such Considerations, and to such Persons, as the Promoters of the Undertaking may think fit, and again to purchase other Lands for the like Purposes, and afterwards sell the same, and so from Time to Time; but the total Quantity of Land to be held at any one Time by the Promoters of the Undertaking, for the Purposes aforesaid, shall not exceed the prescribed Quantity.

If land is acquired for extraordinary purposes by agreement and is not compulsorily taken, sect. 120 of the Scotch Act (which corresponds with sect. 127 of the English Act) does not apply.

Illustration.

A railway company having taken lands by voluntary agreement for extraordinary purposes, under sect. 12 of the Lands Clauses Consolidation (Scotland) Act, sold such lands to another company after the expiration of the statutory period for the sale of superfluous lands. In an action for the price of the land, the defendant company contended that the statutory period for the sale of superfluous lands having expired, the property vested in the adjoining owners by virtue of the 120th section of the Lands Clauses Consolidation (Scotland) Act, 1845 (corresponding with sect. 127 of the Lands Clauses Consolidation Act, 1845), and that the vendors could give no title to it:—*Held*, that the 120th section referred to property compulsorily taken, and had no application to land acquired by voluntary agreement for extraordinary purposes. Doubted (by Lord Westbury) whether

land within the limits of deviation could be regarded as lands acquired for extraordinary purposes by private treaty : *City of Glasgow Union Ry. v. Caledonian Ry.* (1871), L. R. 2 H. L. Sc. 160. "We naturally expect that lands taken by compulsory powers shall, if not wanted for the railway, be restored to the proprietors from whom they have been compulsorily taken. *But the company is left to deal with the lands which they have acquired by private treaty, as any ordinary proprietor may do.* By the 12th and 13th clauses of the Lands Clauses Consolidation (Scotland) Act they are left at liberty to sell those lands from time to time, and to acquire other lands. The contention, therefore, that those lands became by disuse and lapse of time superfluous, within the meaning of the 120th section, is a mere mistake" : *per* Lord Westbury at p. 165, *ib.*

Restraint on
Purchase from
incapacitated
Persons.

14. The Promoters of the Undertaking shall not, by virtue of the Power to purchase Land for extraordinary Purposes, purchase more than the prescribed Quantity, from any Party under legal Disability, or who would not be able to sell and convey such Lands except under the Powers of this and the Special Act ; and if the Promoters of the Undertaking purchase the said Quantity of Land from any Party under such legal Disability, and afterwards sell the whole or any Part of the Land so purchased, it shall not be lawful for any Party being under legal Disability to sell to the Promoters of the Undertaking any other Lands in lieu of the Land so sold or disposed of by them.

Municipal Corpora-
tions not to sell
without the Appro-
bation of the
Treasury.

15. Nothing in this or the Special Act contained shall enable any Municipal Corporation to sell for the Purposes of the Special Act, without the Approbation of the *Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or any Three of them*, any Lands which they could not have sold without such Approbation before the passing of the Special Act, other than such Lands as the Company are by the Powers of this or the Special Act empowered to purchase or take compulsorily.

NOTE.—Words in italics repealed : S. L. R., 1894.

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I. Legal position of wards in the City of London.

Wards of the City of London are not municipal corporations within the meaning of the Municipal Corporations Act, 1835 (repealed by 45 & 46 Vict. c. 50, s. 5, and now replaced by sect. 108 of that Act: see under sect. 7, I., above), and the consent of the Treasury (now the Local Government Board) is not necessary before a sale by them can be completed (see *Finnis to Forbes* (1883), 24 Ch. D. 587, *ante*, p. 82).

II. Mode in which consent of Lords of Treasury can be expressed.

The consent of the Lords of the Treasury may be signified by letter of their officer, but such consent authorises no alienation or charge beyond what was specified in the application.

Illustration.

The Gravesend Corporation had applied to the Lords Commissioners of the Treasury under sect. 94 of the Municipal Corporations Act (5 & 6 Will. IV. c. 76: now 45 & 46 Vict. c. 50, s. 108) for permission to mortgage part of their property. The secretary to the Lords Commissioners replied that such mortgage was approved:—*Held*, that the consent of the Lords Commissioners was sufficiently signified by the letter of their officer, but that such consent could authorise no alienation or charge beyond what was specified in the application: *Arnold v. Gravesend Corporation* (1856), 25 L. J. Ch. 776.

NOTE.—See now the Local Government Board Act, 1871 (34 & 35 Vict. c. 70), s. 5.

III. Effect of consent.

If a corporation sell under a building scheme and the conveyance contains restrictive covenants in conformity therewith, but the Lords of the Treasury are not informed that the corporation would be liable to corresponding restrictive covenants with respect to other land, the corporation cannot be restrained from violating the conditions, nor can a purchaser of other plots conveyed by the corporation without such restrictions.

Illustration.

In March, 1888, the Corporation of L. offered for sale by auction large quantities of land in different parts of the borough, under printed conditions and particulars. There were special conditions restricting the right to build on the land. The sale proved abortive. In June, 1888, D. entered into an agreement to purchase two lots, subject to the conditions. The approval of the Treasury to the sale was obtained in due course. The conveyance contained a covenant by D. in the terms of the restrictive conditions, but there was no reference to those conditions, or to the abortive sale. There was no covenant by the corporation binding them as to the conditions in respect of the unsold lots, and the Treasury were not, before they gave their approval, informed that the corporation would be liable to any such restriction. At a later date the corporation agreed to sell to the trustees of a church two other lots, and authorised them to build thereon in a manner not within the conditions:—*Held*, that if the corporation had been ordinary landowners, they

would have been bound by the original building scheme, and that they, and the trustees, who had purchased with notice of the scheme, would have been restrained from building in a manner contrary to the conditions; but the Treasury had only given their approval to what was to be found in the conveyance and had not sanctioned the disposition by the corporation in favour of D. of any right over land except that sold to him, and hence neither the corporation nor the trustees could be restrained from committing any breach of the conditions: *Davis v. Leicester Corporation*, [1894] 2 Ch. 208.

Purchase of Lands otherwise than by Agreement.

And with respect to the Purchase and taking of Lands otherwise than by Agreement, be it enacted as follows:

NOTE.—It is a general principle of law that a statute is not to be construed so as to take away private property without compensation unless the intention to do so is clearly expressed or necessarily to be inferred: *Barrington's Case* (1610), 8 Co. Rep. 138 (b); *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743; *Western Counties Ry. v. Windsor and Annapolis Ry.* (1882), 7 App. Cas. 178; *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A. C. 355.

16. Where the Undertaking is intended to be carried into effect by means of a Capital to be subscribed before compulsory Powers of Purchase put in force, the whole of the Capital or estimated Sum for defraying the Expenses of the Undertaking shall be subscribed under Contract binding the Parties thereto, their Heirs, Executors, and Administrators, for the Payment of the several Sums by them respectively subscribed, before it shall be lawful to put in force any of the Powers of this or the Special Act, or any Act incorporated therewith, in relation to the compulsory taking of Land for the Purposes of the Undertaking.

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I. Proof of subscription of capital (*see* sect. 17).

II. If the capital is not subscribed the company cannot be compelled by *mandamus* to complete the undertaking.

Illustration.

To a *mandamus* to complete a railway pursuant to an Act incorporating the Lands Clauses Act the return was made that the undertaking was one to be carried into effect by means of a capital to be subscribed by the promoters, and that the capital had not been subscribed for under a contract pursuant to sect. 16 of the Lands Clauses Act, and that the defendants could not then or at any time procure it to be so subscribed:—*Held*, that the return was good, as it showed that a compliance with the command in the writ, which would necessitate the exercise of compulsory powers, would be illegal; *held also*, that the fact that the company had taken the lands of a third party on part of the line in exercise of their compulsory powers did not estop the company from making and relying on the return as to the non-subscription of their capital: *Reg. v. Ambergate Ry.* (1853), 1 El. & Bl. 372.

NOTE 1.—In an earlier case (*Reg. v. Manchester Market Street Commissioners* (1831), 4 B. & Ad. 333, *n.*; 38 R. R. 258 *n.*), it was *held* that a *mandamus* would lie, but the decision was before the Lands Clauses Act, and there seems to have been no section in the special Act analogous to sect. 16, and no reasons appear to have been given.

NOTE 2.—Since this case was decided it has been settled that a statute authorising the construction of a railway is an enabling and not an obligatory Act (see *York and North Midland Ry. v. Reg.* (1853), 1 El. & Bl. 858; *Edinburgh, Perth and Dundee Ry. v. Philip* (1857), 2 Macq. H. L. 514; *Scottish North-Eastern Ry. v. Stewart* (1859), 3 Macq. H. L. 382); so that now, quite apart from the question of the subscription or non-subscription of the capital, a *mandamus* would not lie in such a case (*see* sect. 21).

III. Effect of insufficiency of capital.

If it is clearly established that the sum authorised by the special Act to be raised is wholly inadequate for the completion of the undertaking, the company may possibly be restrained from going on with the undertaking, so far at least as it would interfere with the lands of third parties.

Illustrations.

(1) A canal company were carrying their canal through lands which they were authorised to take. The owner filed a bill to restrain them by injunction, upon the ground that they could not complete the undertaking for the capital authorised. The Court granted the injunction: *Agar v. Regent's Canal* (1814), 1 Swanst. 250; 18 R. R. 68 (decided before the Lands Clauses Consolidation Act, 1845).

(2) Where promoters of an undertaking which cannot be carried out, and which may cause injury to third parties, are proceeding with the undertaking upon their own land, the Court will not interfere by injunction if it be not shown that injury has been done to third parties, or that there is an immediate danger of injury: *King's Lynn Corporation v. Pemberton* (1818), 1 Swanst. 244; 18 R. R. 62. "In the case of *Agar v. Regent's Canal Co.* [*ante*] I acted on the principle that where persons assume to satisfy the Legislature that a certain sum is sufficient for the completion of a proposed undertaking, as a canal, and the event is that that sum is not nearly sufficient, if the owner of an estate through which the Legislature has given to the speculators a right to carry the canal can show that the persons so authorised are unable to complete the work, and is prompt in his application for relief grounded on that fact, this Court will not permit the further prosecution of the undertaking": *per* Lord Eldon, C., at p. 250, *ib.*

(3) "But if a case arises in which parties have been enabled by Parliament to engage in an undertaking, on a representation that 100,000*l.* would enable them to complete it, and if they find afterwards that 100,000*l.* is not enough for that purpose, this Court would, I think, find it very difficult to allow them to proceed with the work till they had satisfied Parliament that, though they had deceived the Legislature, in the first instance, they were entitled to obtain an extension of their powers. There is an agreement on the part of those who satisfy Parliament that they can and will do such a work for such a sum of money, and, upon the faith of that understanding they get the authority to begin the work; but, if they deceive Parliament, what right have they to complain if Courts of justice will not allow them to go on with the deception?" : *per* Lord Eldon, C., in *Blake-more v. Glamorganshire Canal* (1832), 1 Myl. & K. at p. 164; 36 R. R. 289.

(4) "In Mr. Agar's case, which was mentioned at the bar, one point, it is said, was that the Regent's Canal Company could not, for the sum which they had power to raise, complete their works; and if that were clearly made out, Lord Eldon says, in the case before referred to, that a Court of equity would probably grant an injunction; and I fully accede to that proposition, in case the fact were clearly made out and arose either out of circumstances occurring after the passing of the Act, or from a failure to raise the sum contemplated by the Act; for to take any man's land, where the whole work can never be performed, is clearly injurious to him, and a substantial breach of the condition on which the Legislature granted the right to do it" : *per* Alderson, B., in *Lee v. Milner* (1837), 2 Y. & C. at p. 619.

(5) Where, by the terms of a local Act, commissioners had a continuing right to exercise compulsory powers from time to time, so long as the full effect of the purposes remained unfulfilled, a person whose property was required was *held* to have no right to an injunction to restrain the commissioners from taking the steps prescribed by the Act until they should show a sufficient fund in hand to satisfy the price which might be awarded to the owner or until they should show the means whereby they proposed to procure it : *Salmon v. Randall* (1838), 3 Myl. & Cr. 439; 45 R. R. 306. "It is impossible to suppose Lord Eldon could have meant in [*Agar v. Regent's Canal Co., supra*] that, after an Act of Parliament has been passed giving certain powers, and authorising a body of persons to carry on certain works, those against whose rights such works are to be carried into effect are to come into this court and say, 'We will undertake to prove that you cannot, with the money which you have in hand, carry those works into effect'; and that therefore, and immediately, in that state of circumstances, the Court is to interfere. If that were so, it is quite obvious that not a single Bill passes the Legislature authorising the formation of a railway or a canal but would be brought immediately into this court, thus making it the duty of the Court to investigate the probable expense of the speculation; and if it appeared that the money which the parties had at the time would not enable them—as in those cases, generally, it would not enable them—to carry their speculation into effect, the Court would be called upon to say they should be prohibited from going on with it altogether" : *per* Lord Cottenham at p. 445, *ib.*

(6) "At one time the doctrine held in this court was that unless those who were enabled to carry on such a speculation could satisfactorily show that they had the means of completing the entire undertaking (the whole and not a part of which was alleged to be for the public good), they should not be allowed to invade any man's property in the execution of a part only of their undertaking. . . . I am not at all clear that this difficulty may not lead to a much more serious inconvenience than has yet been apprehended, and it was with that view that I adverted to the question arising on that which was the doctrine of the Court at one time, and which, for anything I know, may be applied again—viz., that if it be shown that the plan marked out by Parliament cannot be executed, have the company a right to proceed at all with the railway? If it be clear that Parliament intended a communication by railway from Liverpool to Bury, and if it be also perfectly clear that the line will be cut off

and that the whole of it cannot be effected, has this company a right, under such circumstances, to persist in their undertaking and invade the property of individuals when they are only authorised to proceed on the principle that they are providing for the public benefit by securing the whole line of communication? I state this to show how strongly I feel that, as to all those things with respect to which they were dependent on individual agreement, it was the duty of the company to settle those agreements before they began to cut anywhere. It would be a strong measure indeed to allow men's properties to be summarily taken from them on the notion of the general benefit, when the parties taking it have not done those things which are incumbent on them to secure their capacity and ability to complete the whole undertaking": *per* Lord Langdale, M.R., in *Gray v. Liverpool and Bury Ry.* (1846), 9 Beav. at pp. 394, 400—401.

IV. When this section is not applicable.

(a) The section does not apply to purchases by agreement, and agreements can therefore be made by the promoters for the purchase of lands before the capital of the undertaking has been subscribed. A notice to treat, assented to by the landowner, is not an exercise of compulsory powers within this section (see *post*, p. 154).

Illustrations.

(1) The P. Railway Co., whose special Act incorporated the Lands Clauses Act, gave G. notice to treat. No agreement was come to as to the value of the lands. G. required the company to issue their warrant to the sheriff to summon a jury. The company refused, and, on G. bringing an action for a *mandamus*, pleaded that at the time the notice was given the whole of the capital had not been subscribed:—*Held*, that a notice to treat, if assented to by the land owner, is not an exercise of the "powers of the Act in relation to the compulsory taking of land" within the meaning of sect. 16 of the Lands Clauses Act, and that the section is for the protection of the landowner and not of shareholders: *Guest v. Poole and Bournemouth Ry.* (1870), 39 L. J. Ch. 329. "Giving notice to treat is a neutral proceeding. . . . If the Legislature had intended to make it unlawful on public grounds to give notice to treat where all the capital was not subscribed, one would expect a clause to that effect. Sect. 16 is not framed for that, but only for the protection of landowners. It is clearly not *ultra vires* for a company to buy land by agreement before all the capital is subscribed. . . . I think, therefore, sect. 16 does not operate to prevent a company from giving notice to treat before the capital is subscribed, and affords no answer for the defendants": *per* Montague Smith, J., at p. 332, *ib.*

(2) "If the company have not got their capital subscribed, they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the landowner in order to ascertain whether he is willing to make the contract with the railway company, the company saying, 'I want that land; will you sell it to us?' In my opinion it cannot be said that that alone is an exercise of compulsory powers. We are not deciding this for the first time, because it was decided in 1870 in *Guest v. Poole and Bournemouth Ry.* [*supra*] that notice to treat was not an exercise of compulsory powers": *per* Cotton, L.J., in *In re Uxbridge and Rickmansworth Ry.* (1890), 43 Ch. D. at p. 563.

(b) The section does not, it seems, apply to entries under sects. 84 and 85.

Illustration.

This was the view taken by Lord Bramwell in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. 787. He there said (p. 810): "But it is said that the

respondents were entitled to proceed under sect. 85 of the Lands Clauses Act without their whole capital being subscribed, because under sect. 85 the land is not taken, but only 'entered upon.' I have come to the conclusion that Mr. Upjohn is right in this. From sect. 16 to sect. 68 inclusive are provisions giving power in relation to the compulsory taking of land. Sect. 69 is under a new heading. So are sects. 84 and 85. It is clear that sect. 84 applies to cases when there is an agreement as to price, as well as to cases where there is not. Sect. 85 supposes that an agreement may be come to after proceedings taken as therein mentioned. The expressions used in the heading and in both sections are 'entry and enter.' In sect. 89 the words are 'enter upon and take possession,' not 'take' merely. The sum awarded might be larger than the sum deposited, and the sureties might be insolvent. Surely the owner of the land would not have lost his land, or his lien for its price. Sect. 16 was for the protection of landowners, but they are sufficiently protected by sect. 85 in the cases it applies to. In short, the appellants' case would read into sect. 85 provisions relating to the power of compulsory taking, *i.e.*, purchasing, to which sect. 85 does not relate. Fry, J., expressly ruled to this effect in *Loosemore v. Tiverton Ry.* (1882), 22 Ch. D. 25, and on this point his ruling was not dissented from." In the same case Lord Watson (who dissented from the decision of the House) expressed the opinion that sect. 16 applies indirectly, though not directly, to an entry under sect. 85, for an entry cannot be made under sect. 85 until notice has been given under sect. 18, which notice cannot be given until the capital has been subscribed. Lord Fitzgerald, the other law lord who took part in the decision, based his judgment on other grounds, and did not discuss this point.

(c) The section does not apply to an extension of an undertaking where the funds are to be furnished by an existing company, as, for example, where a railway company is authorised by statute to construct a branch railway.

Illustrations.

(1) Certain landowners interested applied for a *mandamus* to compel a railway company to carry out a proposed branch railway. The company pleaded that the capital required for the branch had not been subscribed, and that therefore, under sect. 16 of the Lands Clauses Consolidation Act, 1845, they had no power to acquire the necessary land:—*Held*, that this was no answer, as sect. 16 did not apply to a branch line to be constructed by an existing company: *R. v. Great Western Ry.* (1852), 1 El. & Bl. 253. This case went to the Exchequer Chamber (*see* 1 El. & Bl. 874); the point for which it is here cited was not dealt with.

(2) An existing railway company obtained powers to build a new branch line. They gave notice to treat as to certain lands, and took possession, paying into court the estimated value. The owner sought to restrain them from taking possession or acquiring the lands, on the ground that the capital had not been fully subscribed:—*Held* (following *R. v. Great Western Ry.*, *ante*), that sect. 16 of the Lands Clauses Consolidation Act, 1845, did not apply to such a case: *Weld v. London and South-Western Ry.* (1863), 32 Beav. 340.

(d) The section does not apply where a company by its special Act is authorised to take merely an easement over or under the land of another company.

Illustration.

The S. Company were authorised by their special Act to make a railway and to carry it across the railway of the G. W. Company at one point by a bridge and at another by an

archway under that railway, the archway to remain the property of the G. W. Company. The Act, by a section headed "for the protection of the G. W. Company the following provisions shall have effect," provided that the S. Company should not purchase and take any land of the G. W. Company which the S. Company were authorised to use, enter upon, or interfere with, but that the S. Company might purchase and take an easement or right of using the same in perpetuity for the purposes of the Act. The Lands Clauses Act (except where expressly varied by the Act) was incorporated. The S. Company gave the G. W. Company a notice to treat for the purchase of an easement or right in or over lands of the G. W. Company for the purposes of the crossings, and shortly afterwards a notice of their desire to enter upon and use the lands for these purposes and of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of such easement or right. The valuation was made, and the amount thereof deposited and a bond entered into under sect. 85 of the Lands Clauses Act. The G. W. Company brought an action for an injunction to restrain the S. Company from entering or continuing upon the lands or from putting in force any of the powers of the special Act or the Lands Clauses Act in relation to the compulsory purchase of land, on the ground that the capital of the S. Company had not been duly subscribed, as required by sect. 16 :—*Held* (Lord Watson dissenting), that sect. 16 did not apply, and that the injunction must be refused : *Great Western Ry. v. Swindon and Cheltenham Extension Ry.* (1884), 9 App. Cas. 787.

A Certificate of Two Justices to be Evidence that the Capital has been subscribed.

17. A Certificate under the Hands of Two Justices, certifying that the whole of the prescribed Sum has been subscribed, shall be sufficient Evidence thereof, and on the Application of the Promoters of the Undertaking, and the Production of such Evidence as such Justices think proper and sufficient, such Justices shall grant such Certificate accordingly.

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I. The justices' certificate under this section is conclusive evidence that the prescribed sum has been subscribed.

Illustration.

The J. Railway Co. were incorporated in 1864, and obtained a certificate that the whole of the capital had been subscribed. In 1866 the J. Company gave notice to treat to the Y. Iron Co., but nothing further was done. In 1869 the J. Company, having failed to raise sufficient capital to make the line, procured an Act amalgamating it with the N. Railway Co. In 1871 the N. Company took possession of the land under their compulsory powers. The Y. Company filed a bill to restrain the N. Company from continuing in possession :—*Held*, that the notice had not been rendered inoperative by lapse of time; and that the certificate under sect. 17 was conclusive evidence that the capital had been subscribed : *Ystralyfera Iron Co. v. Neath and Brecon Ry.* (1873), L. R. 17 Eq. 142.

II. As to the effect of the subscribed capital not being sufficient to complete the undertaking, *see* sect. 16, *ante*, pp. 107—108.

18. When the Promoters of the Undertaking shall require to purchase or take any of the Lands which by this or the Special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give Notice thereof to all the Parties interested in such Lands, or to the Parties enabled by this Act to sell and convey or release the same, or such of the said Parties as shall, after diligent Inquiry, be known to the Promoters of the Undertaking, and by such Notice shall demand from such Parties the Particulars of their Estate and Interest in such Lands, and of the Claims made by them in respect thereof; and every such Notice shall state the particulars of the Lands so required, and that the Promoters of the Undertaking are willing to treat for the Purchase thereof, and as to the Compensation to be made to all Parties for the Damage that may be sustained by them by reason of the Execution of the Works.

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I. Construction of the section.

(a) As the Act gives powers to the promoters for their private gain, it will, where there is any ambiguity in its provisions, be construed adversely to the promoters rather than in their favour.

Illustrations.

(1) In deciding a question as to dues payable to a dock company under statute, Lord Ellenborough said :—"If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public and most against that of the company, because the company in bargaining with the public ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended, but when plain words are used their ordinary sense must be given to them": *Gildart v. Gladstone* (1809), 11 East, 675.

(2) "They who enter in such cases must clearly show their authority; and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property. If such a construction were not adopted, Acts would be framed ambiguously in order to lull parties into security": *per* Best, C.J., in *Scales v. Pickering* (1828), 4 Bing. 448.

(3) "When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the Legislature on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under our constitution. Such Acts of Parliament have now become extremely numerous; and from their number and operation, they so much affect individuals that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals": *per* Lord Eldon in *Blakemore v. Glamorganshire Canal* (1832), 1 Myl. & K. at p. 162; 36 R. R. 289.

(4) "The contest is, in fact, merely about money. . . . At the same time, it is extremely important to watch over the interests of those whose property is affected by these companies, to take care that the company shall not, in any misrepresentation they may make, if they have made any, be permitted to exercise powers beyond those which

the Act of Parliament gives them, and to keep them most strictly within the powers of the Act of Parliament. The powers are so large—it may be necessary for the benefit of the public—but they are so large, and so injurious to the interests of individuals, that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers, they must go elsewhere and get enlarged powers; but they will get none from me by way of construction of their Act of Parliament”: *per* Lord Cottenham, C., in *Webb v. Manchester and Leeds Ry.* (1839), 4 Myl. & Cr. 116 at p. 120; 48 R. R. 28.

(5) “It is very necessary, I think, and I have had reason to have ample experience on that subject, that this Court should deal very strictly with these companies, and prevent them, with the large powers that are given them by Acts of Parliament, from defeating the rights and interests of individuals. But it is also the duty of the Court to take care that if individuals avail themselves of any omission of any power on the part of the company, this Court should not assist those individuals in extorting money from the company. It is the duty of the Court in every case to steer clear of those two opposite extremes”: *per* Lord Cottenham, C., in *Bell v. Hull and Selby Ry.* (1840), 1 Rail. Cas. at p. 636.

(6) “And it is to be observed, that the language of these Acts of Parliament is to be treated as the language of the promoters of them. They ask the Legislature to confer great privileges upon them and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public”: *per* Tindal, C.J., in *Parker v. Great Western Ry.* (1844), 7 M. & G. at p. 288.

(7) “It has been so repeatedly held that it has become an axiom that where the Acts of Parliament leave some doubt as to any matter between the public and the company, the inclination ought to be rather to give such construction to the Act as is consistent with the justice of the case, if the words will bear them, and rather to put a construction adverse to the company than in their favour, inasmuch as they are the persons who have the preparation of the Act and have the best means of protecting themselves”: *per* Lord Truro, C., in *Ex parte Eton College* (1850), 20 L. J. Ch. at p. 8.

(8) “Though we accede to the general observation that persons obtaining from the Legislature, by Acts of Parliament like those now before us, powers to interfere with rights of property for their own purposes (whether of a local nature or merely private) are bound strictly to adhere to the powers so conceded to them, to do no more than the Legislature has sanctioned and to proceed only in the mode which the Legislature has pointed out, yet it does not follow that any one of Her Majesty’s subjects has a right to complain whenever Parliamentary powers of this nature have not been strictly followed or are intended to be transgressed”: *per* Lord Cranworth in *Liverpool Corporation v. Chorley Waterworks* (1852), 2 De G. M. & G. at p. 860.

(9) By a railway Act a company was empowered to construct a certain railway, and, for that purpose, “to enter upon, take and use such of the said lands as should *be necessary* for such purposes.” As to this provision, Turner, L.J., said that: “The Act, then, did not empower the company to take all the lands, but ‘such as should be necessary for such purposes,’ that is, for making and maintaining the line. It occurred to him . . . that the expression ‘necessary’ might mean necessary in the judgment of the railway company. No doubt that was so to a certain extent, for any deviation in the line must be left to the judgment of the company, and to that extent the word must have the construction contended for; but it did not follow that it should have the same construction in all cases, and he was of opinion that it ought not to do so. If it were otherwise, the company would be entitled to take all the lands mentioned in their plans, which the Act clearly did not contemplate. And he was the more satisfied that this was the right view, because it was well established that such Acts as the present ought to be

construed strictly with regard to the rights of the company": *Erersfield v. Mid-Sussex Ry.* (1859), 5 Jur. (N.S.) at p. 778.

(10) "I entirely concur in the rule laid down by Lord Cottenham at an early time of the administration of justice with regard to these railway works, and other works of a similar description, that it was incumbent upon the company to prove clearly and distinctly from the Act of Parliament the existence of the power which they claimed a right to exercise; and if there was any doubt with regard to the extent of the power claimed by them, that doubt undoubtedly should be for the benefit of the land-owner, and should not be solved in a manner to give to the company any power that was not most clearly and expressly defined in the statute": *per* Lord Cranworth in *Simpson v. South Staffordshire Waterworks* (1865), 11 Jur. (N.S.) at p. 454.

(11) "In cases like that which is now before the Court, the burden lies upon those who seek to take the property of others against their will to show that a compulsory power enabling them so to do has been conferred upon them by Parliament. Such powers are not to be created or extended by doubtful implication, but, as Lord Cottenham observed in the case of *Webb v. Manchester and Leeds Ry.* (1839), 4 Myl. & Cr. at p. 120; 48 R. R. 28, it is the duty of the Court to keep these corporations, which possess such extraordinary powers, strictly within the limits of those powers": *per* Selwyn, L.J., in *Lamb v. North London Ry.* (1869), L. R. 4 Ch. at p. 526.

(12) "Now it is to be observed that if those Acts [the Paving Acts of Geo. III.] have taken away and interfered with such rights, they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it. If it is clear that Parliament has so ordered, *and there is no other way of construing the words of the Act*, then one is bound so to construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so": *per* Brett, M.R., in *Att.-Gen. v. Horner* (1884), 14 Q. B. D. at p. 257.

(b) In the case of public bodies carrying out works for the public benefit and without profit the strict rule of construction before mentioned does not apply, and the Act giving such powers will be construed more liberally in favour of such public bodies than it would be in the case of private promoters.

Illustrations.

(1) By an Act of Geo. III. "the company was established for lighting the town; but that was not the only purpose of its incorporation, as it was incorporated also for the purpose of contracting with the commissioners for lighting the town and port and places adjacent, and power is given to contract accordingly. The Act has therefore two purposes, the public advantage and the convenience of the inhabitants, and *an Act of Parliament passed for these purposes ought not to receive narrow construction*. . . . There is only one question [upon sect. 46 of the Act], and that is, as to the meaning of the words 'for any other purposes which may be required under this Act.' It is contended that the clause is to be construed *reddendo singula singulis*, and that the consent given for any purpose must be used for the same purpose. But if this had been the intention of the Legislature, surely the rights to flow from the consent would not have been expressed in terms more extensive than the consent from which they were to flow, as is plainly the case in this Act, for, according to the language of it, if the required consent has been given to lay down any main or mains, pipe or pipes, the Act is not to prevent the pavement from

being broken up for the purpose not merely of laying down or repairing such main or mains, pipe or pipes, but any pipe or pipes whatsoever": *per* Turner, L.J., in *Dover Gas Light Co. v. Dover Corporation* (1855), 7 De G. M. & G. at p. 555.

(2) "This Act [the Metropolis Management Act, 1855] must be construed upon the strict construction of its clauses, and if they should appear to be in any degree doubtful, then the scope, frame and object of the whole Act must be taken into consideration, as in construing any other instrument; and for that purpose I do not think it immaterial to refer back to a view of the scope and frame of the clauses which are contained in similar Acts, as far as they may be of any assistance, although I doubt whether it would be necessary to have recourse to any such assistance in construing this particular Act. The 135th section is, in truth the one which creates the greatest difficulty on the part of the plaintiffs, and Sir Hugh Cairns felt this difficulty in the outset, and, therefore, in endeavouring to get out of it, he invited me to consider the improbability of the Legislature conferring such large powers upon this body, seeing how careful it has been upon all occasions in which railway and the like companies have been authorised to take lands compulsorily, for the particular purposes of their undertaking, to guard and protect the interests of the landlord. In such a state of the argument it was a perfectly legitimate course on the part of the defendants to say that the measure of the intention of the Legislature with regard to those Acts which deal with private companies is not to be applied at all to an Act of this description, which is an Act for an entirely different purpose; not being for the purpose of conferring a benefit upon a certain company, upon the condition and consideration of that company providing public accommodation in return, but an Act solely intended for the public benefit, and vesting certain powers in the commissioners for the general benefit of the whole community": *per* Wood, V.-C., in *North London Ry. v. Metropolitan Board of Works* (1859), 28 L. J. Ch. at p. 910.

(3) The principle that promoters who seek to put into operation powers of compulsory acquisition of lands can do so only for the purposes for which they are authorised to take the land, "applies to a railway company, and also applies to a municipal body who have power to take lands compulsorily for the purpose of improvements; but as a railway company is chiefly seeking profit in the transaction, whereas in the case of a municipal body profit is not their object, in construing the Act of Parliament a greater liberality has been shown towards a public body, such as a municipal corporation or the like, than is shown to a railway company, which is looked upon more as a body of persons speculating for their own benefit": *per* Chitty, J., in *Rolls v. School Board for London* (1884), 27 Ch. D. at p. 642.

II. When notice to treat must be given.

Sect. 18 requires promoters to give notice to treat when they "require to purchase or take lands which by this or the special Act, or any Act incorporated therewith, they are authorised to purchase or take."

In order to come within this part of the section, two conditions must be fulfilled, *viz.* :—

- (i.) The promoters must be "*authorised*" by the special Act to take the land; and
- (ii.) The promoters must "*require*" the land for the purposes of the undertaking.

(a) Notices and deposit of plans.

- (i.) The promoters of railway and similar companies must, by the

standing orders of Parliament, deposit plans showing what they intend to do ;

- (ii.) A notice given to a landowner before the passing of the special Act and a deposit of plans and sections by the promoters while the Bill is depending in Parliament are binding on promoters only in so far as they are incorporated in the special Act.

Illustrations.

(1) The plaintiff was the owner of a house near a public ground and connected therewith by an avenue and a lodge. A railway company deposited plans, &c., whereby it was shown that they intended to cross the plaintiff's avenue 520 ft. from the lodge, under a bridge, raising the level of the roadway of the avenue only 2 ft., and by means of a cutting 15 ft. in depth. The plaintiff, relying on the plans and sections, did not oppose the Bill in Parliament, which accordingly passed into an Act. The railway company afterwards gave notice of their intention to deviate from the original plans, to make their cuttings 61 ft. nearer the plaintiff's house, and to make a bridge over his avenue 17 ft. high :—*Held*, that the plaintiff was not entitled to an injunction restraining the railway company from crossing the plaintiff's avenue in any other manner than that shown by the original plans ; *held also* that parties are bound by what is represented on the deposited plans and sections so far only as such plans and sections are incorporated in or specially referred to by the Act : *North British Ry. v. Tod* (1846), 4 Rail. Cas. 449.

(2) “The *North British Ry. v. Tod* [*supra*] . . . expressly decided that the plans and sections deposited with the clerk of the peace are not to be referred to for the purpose of construing the special Act, except so far as they may have been incorporated within its provisions, and that they are only binding to the extent of the *datum* line, and the line of railway measured with reference to that *datum* line ; but that they are not to be referred to for the purpose of surface levels, or in the construction of any collateral or accommodation works which may be requisite during the formation of the railway ” : *per* Lord Cottenham in *Beardmer v. London and North-Western Ry.* (1849), 1 Mac. & G. 112 at p. 114.

(3) “Now, it is quite clear, on general principles, and it is decided by the House of Lords in *North British Ry. v. Tod* [*supra*] that the mere exhibition of those plans and sections whilst the Bill was depending in Parliament does not make them obligatory on the promoters after the Act has passed, unless there be something in the special Act when passed, or in the general Acts with which it is incorporated, which requires that the plans should be followed. The exhibition of plans and sections before the Act is passed is analogous to parol negotiations and proposals preliminary to the making of a private agreement which is afterwards reduced into writing. Such proposals do not bind the parties, except in so far as they are in the writing ” : *per* Campbell, C.J., in *R. v. Caledonian Ry.* (1850), 16 Q. B. at p. 30.

(4) “A railway company is obliged by the standing orders to deposit certain plans showing what they propose to do ; but it has been settled law since the case of *North British Ry. v. Tod* [*supra*] that a company is not bound by the mere fact of a representation having been made on a plan deposited by them, unless the representation is incorporated in the Act. And this is the law, although the fact of such representation having been made may have had the effect of preventing the persons interested in the matter from opposing the railway company in Parliament ” : *per* Mellish, L.J., in *Att.-Gen. v. Great Eastern Ry.* (1872), L. R. 7 Ch. at p. 482.

(5) A corporation served the usual notice on a landowner before applying to Parliament for power to take his land. The Act when obtained gave them power to take more of his land than was described in the notice :—*Held*, that the corporation was not prevented

from taking more land than was described in the notice: *In re Huddersfield Corporation and Jacomb* (1874), L. R. 10 Ch. 92. "It is now settled law that what was contained in the notice to the landowner as to the width which the conduit was to be cannot affect the corporation, even if it got into the deposited plans, unless it was contained in the Act of Parliament": *per* Mellish, L.J., at 94, *ib.* (and see *post*, p. 137).

- (iii.) The accidental omission from the book of reference of the name of a person interested in the land will not preclude the promoters from taking such land if the Act empowers them to take it.

Illustration.

The names of certain intermediate lessees were by mistake wholly omitted from the book of reference, and they were unaware of the intention to take their land until a notice to treat was given them after the company had obtained their special Act, which incorporated the Lands Clauses and Railways Clauses Acts :—*Held*, that the descriptions in the book of reference mentioned were not intended to be a description accurate in all respects, and therefore that the inaccuracy which had occurred did not disentitle the company from taking the land under their powers: *Kemp v. West End and Crystal Palace Ry.* (1855), 1 K. & J. 681.

- (iv.) A landowner has a right to require that no deviation from the plans incorporated or referred to in the special Act be made to his prejudice, or that his land be taken for a different purpose than that authorised by the special Act.

Illustrations.

(1) "These Acts of Parliament have been called Parliamentary bargains made with each of the landowners. Perhaps, more correctly, they ought to be treated as conditional powers given by Parliament to take the land of the different proprietors through whose estates the works are to proceed. Each landholder, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and anyone else": *per* Alderson, B., in *Lee v. Milner* (1837), 2 Y. & C. at p. 618; 47 R. R. 463.

(2) In *Ware v. Regent's Canal* (1858), 3 De G. & J. 212, Lord Chelmsford, C., cited *North British Railway v. Tod* (1846), 12 Cl. & F. 722, and *held* that there is a presumption of intention that the plans and sections referred to in an Act conferring powers over the property of individuals should be adhered to.

(3) A waterworks company, before applying for powers, deposited plans showing that a certain field would be affected by a tunnel passing 45 ft. below the surface, and gave notice accordingly to the lessees of the property. They afterwards obtained a special Act, by which it was provided that they should have power to take the field, and therein construct an aqueduct "in tunnel or otherwise, as shown on the original plans, commencing, &c., and terminating by a junction in the parishes of, &c., with the aqueduct belonging to the company." The company afterwards served notice to treat, with a view to sinking shafts and erecting pumping engines for the purpose of increasing the water supply. The lessees thereupon filed their bill for an injunction to restrain the execution of these works :—*Held*, that the company could not take or permanently use the field for any other purpose than that indicated upon the original plans, and could take only so much of the

field as was required for the construction of the tunnel: *Simpson v. South Staffordshire Waterworks* (1865), 34 L. J. Ch. 380. "I think the true interpretation of the Act of Parliament is brought back to that which is certainly consistent with the general intent and the anxious purpose of the Legislature, and also with what natural justice would dictate, namely, that the company shall not be permitted to commit a surprise upon the landowner by telling him first that he will be required to part with so much of his land only as is necessary for a particular and a definite and expressed purpose, and afterwards telling him—'Nay, but we shall now take the whole of your land, because we deem it right to superadd to what we have expressed something in addition, something in extension of our original plan, but which was not indicated upon the notice given to you or upon the plans and sections which we were bound to deposit, and did deposit, in order that you might know how your property would be affected by our undertaking': *per* Lord Westbury at p. 390, *ib*."

- (v.) Where the special Act authorises the taking of the lands delineated on the deposited plans and described in the books of reference the question whether a particular piece of land is or is not "delineated" depends upon whether the plan is so sufficiently clear as to bring home to the mind of the landowner that the promoters intend to take that piece of land.

Illustrations.

(1) The word "delineated" means sketched or represented, or so shown that landowners would have notice that the land might be taken: *Douling v. Pontypool, Caerleon and Newport Ry.* (1874), L. R. 18 Eq. 714.

(2) When a railway company desires to take part of a large piece of land not divided up, the deposited plans should show clearly how much they want power to take: *Protheroe v. Tottenham and Forest Gate Ry.*, [1891] 3 Ch. 278. "I cannot help thinking that Hall, V.-C., in *Douling's Case*, put as wide an interpretation upon the word 'delineated' as it could possibly bear. . . . If I had gone on the land as the landowner, with the deposited plan and the book of reference, I should certainly never, so far as I can picture the state of things to myself, have come to the conclusion that the railway company intended to take this land. I think therefore, that it is not 'delineated.'": *per* Fry, L.J., at p. 290, *ib.*, and see *Coats v. Caledonian Ry.* (1904), 6 Ct. of Sess. Cas. (5th Ser.) 1042.

- (vi.) "Deviation" means deviation of the whole works. It refers to deviation of the *medium filum viæ*, and is to be calculated, vertically or horizontally, from the *datum* line alone.

Illustrations.

(1) "The first question, as it seems to me, to be considered is this: What is the legal construction of the Acts of Parliament? Does the company, or does it not, propose to exceed the powers which the Acts of Parliament confer upon it? Now, it is admitted that, if the deviation is to be calculated from the *datum* line alone, the company have not, because neither vertically nor laterally do they exceed the powers of deviation which are conferred upon them by the Acts of Parliament. Well, then, that raises the question whether those powers of deviation are to be calculated from the *datum* line alone, or whether the surface line is to be taken into consideration?—and my opinion is that the

Act of Parliament does refer everything to the *datum* line": *per* Lord Cottenham, C., in *North British Ry. v. Tod* (1846), 12 Cl. & F. at p. 737.

(2) "But it is contended, secondly, that as to fifteen perches the entry was not lawful, and being bad in part is bad altogether: first, because they are beyond the line of deviation; and, secondly, because they were not necessary for the purposes of the special Act. With respect to the first ground of objection, we are of opinion that the expression "deviation" in the Acts of Parliament, and particularly 8 & 9 Vict. c. 20, s. 15, is to be taken with reference to the line of railway only; that is, that the line of railway actually laid down shall not deviate more than one hundred yards from the line laid down, and delineated in the Parliamentary plans, the *medium filum viæ* of each being the commencement and termination in measuring those one hundred yards. This appears to be the natural construction of the Acts, and is in accordance with the decision of the Court of Exchequer in *Doe d. Payne v. The Bristol and Exeter Ry.*, and of the Vice-Chancellor of England in *Crawford v. The Chester and Holyhead Ry.* In this case there has been no deviation in that sense, and the first ground of objection is not in truth raised by the facts": *per* Patteson, J., in *Doe d. Armistead v. North Staffordshire Ry.* (1851), 20 L. J. Q. B. at p. 253.

(3) Commissioners were empowered to construct a reservoir in a valley, at a fixed spot, subject to powers of deviation. They constructed the embankment higher up the valley, leaving the level of the reservoir the same, and thus materially decreasing its capacity. It was *held* that deviation in such circumstances meant deviation of the whole reservoir, and not of one side of it only. The reservoir was intended to compensate mill-owners for the abstraction from the stream in the valley of water which the commissioners were empowered to take, and an injunction was granted, at the suit of a mill-owner, restraining the commissioners from impounding or storing up or taking any water save by the works authorised by their Acts: *Herron v. Rathmines Commissioners*, [1892] A. C. 498.

- (vii.) If a piece of land shown on the plans is not defined on all sides by boundary lines, the promoters may not pass the line of deviation, but where the promoters take land beyond that line the Court will not grant an injunction against them if the quantity and value of the land so taken in excess of their powers are extremely small.

Illustrations.

(1) In the plans deposited by a railway company a field was delineated, showing the line; the limits of deviation; and the boundaries on one side of those limits, but leaving the boundaries on the other side undefined. The Court restrained the company from taking the land beyond the limits of deviation on the undefined side, although the name of the owner of the whole field was described in the book of reference: *Wrigley v. Lancashire and Yorkshire Ry.* (1863), 4 Giff. 352.

(2) A railway Act empowered the company to take lands delineated on the deposited plans and described in the book of reference:—*Held*, that where the boundary of a plot was left unclosed outside the limits of deviation, the company might at any rate take up to the limits of deviation: *Dowling v. Pontypool, Caerleon and Newport Ry.* (1874), L. R. 18 Eq. 714. *Semble*, where a railway company takes land in excess of its powers (as, for example, by going outside the limits of deviation) the Court will not grant relief by injunction if the quantity and value of the land are extremely small, *ib.*

(3) The deposited plans of a railway company showed the lines of deviation of the railway passing through a market garden, through which the proposed line would pass. The paths, &c., in the market garden were shown between the limits of deviation and the line, and on one side they were shown as crossing the line of deviation, indicating that the garden extended in that direction. They did not extend (as shown) to the limits of the land proposed to be taken. The boundary of the garden on that side was not shown, and there was nothing on the plans to indicate how much the company intended to take :—*Held*, that the company could only acquire so much of the garden on that side as was included within the line of deviation : *Protheroe v. Tottenham and Forest Gate Ry.*, [1891] 3 Ch. 278 ; see also *Coats v. Caledonian Ry.*, p. 120, *supra*.

(viii.) Lands outside the limits of deviation which are properly referred to in the plans and book of reference may be taken by the company if they are *bonâ fide* required for the purpose of making the line within the limit of deviation.

Illustrations.

(1) By sect. 57 of the special Act the land to be taken up for *the line* of railway was not to exceed 22 yards in breadth except where a greater breadth should be necessary for embankments, cuttings, &c. Sect. 59 provided that the company in making the railway and other works should not deviate from the line delineated on the deposited plan more than 100 yards, and that no deviation should extend into the lands or property of any person mentioned in the book of reference unless omitted by mistake, and the company were empowered to make such deviation in the section as might be necessary in consequence thereof :—*Held*, that the section only prohibited the company from making the substituted *line of railway itself* at a greater distance than 100 yards from the line delineated on the plan, and that it did not prevent them from taking lands at a greater distance from it than 100 yards for the purpose of embankments, cuttings, &c., the intention of the Act being to give the company the same incidental powers with respect to the deviated line as they had with respect to the original line : *Doe d. Payne v. Bristol and Exeter Ry.* (1840), 6 M. & W. 320. “With respect to the deviation, which seems to be the principal point on which the opinion of the Court was sought to be obtained, as a guide for the construction of Acts of Parliament of this kind in future, it appears to me, I own, to be a very simple question. In the Parliamentary plan a line is laid down, and a certain deviation from that line is permitted to take place. The Parliamentary plan is to be the guide for persons taking it in their hands, to know in what direction the railroad is to go across the face of the country. What is ‘the line’ laid down in the Parliamentary plan ? What line across the face of the country does it represent ? It appears to me that it represents the *medium filum viæ* of the railway which is to be thereafter made ; and the deviation which is to be allowed is to be a deviation between the *medium filum viæ* of the railway as described by the Parliamentary plan and the *medium filum viæ* of the railway which is ultimately to be laid down ; and if between these two corresponding points an interval of not more than 100 yards exists, measured in a horizontal level, the deviation does not exceed that which is allowed by the Act of Parliament to be made. That appears to me to be a correct definition of the deviation allowed by the 59th section of the Act ; and if that be so, according to the evidence in this case, the distance between the two lines does not exceed the limit which the Act of Parliament has provided. But it is suggested to us that the word ‘deviation’ cannot have this sense, and cannot mean the interval between the two *media fila viæ*, by reason of the words in the same clause, which provide that ‘the deviation shall not extend into’ lands not mentioned in the books of reference. I perfectly agree that the deviation cannot extend into lands not mentioned in the books of reference ; and inasmuch as this is a Parliamentary bargain between the public (including the railway proprietors) on the one side and individuals on the other, I

agree that it must faithfully and correctly be performed, and there can be no deviation at all into lands not mentioned or defined by the Act of Parliament ; for, although the parties themselves might permit the company to go over some of their lands, yet other people have an interest not to allow it. But this provision, as it appears to me, does not extend to more than the line of railway : it does not extend to slopes and embankments " : *per* Alderson, B., at p. 345, *ib.*

(2) A railway company were empowered by their Act to construct, subject to the powers of deviation in the Railways Clauses Act, an extension of their line and a station, and to take such of the lands delineated in the plans as might be necessary for the purpose. The company were desirous of taking two plots of land of the plaintiff, which were delineated on the plans, but both lay in part outside the line of deviation. The whole of the plots was required for the extension and the station :—*Held*, that the company were empowered to acquire the whole of the plots : *Crawford v. Chester and Holyhead Ry.* (1847), 11 Jur. 917.

(3) By a special Act a market company was authorised to erect a market-house on land described on the deposited plans, and the company was also empowered to alter and widen streets in the manner shown on the plans, and to purchase additional lands. R. was the owner of land on the west side of one of the streets on the western boundary of the area mentioned in the preamble, and his land was described on the deposited plans, but it did not thereby appear that more was intended to be taken than would be enough to widen one of the streets mentioned in the Act. The company proceeded to take the whole of R.'s property, and to erect a covered building in addition to the market-house authorised :—*Held* that, as R.'s land was described on the plan and as therefore it might be wanted, the company had power to take it ; and that the company was not restricted by the word "market-house" (in the singular) ; and that the company was the proper judge of what lands were "necessary" for the works : *Richards v. Scarborough Public Market* (1853), 23 L. J. Ch. 110.

(4) The L. Railway Co. gave F. notice to treat in respect of so much of two houses, with their curtilages, as were within the limits of deviation. F. gave notice to the company that he would not sell more than he was obliged. The tenants of the two houses required the company to take the whole of the two tenements. The company served a new notice to treat for the remaining part of the tenements :—*Held*, that the power of the company to take lands compulsorily is not limited to lands within the limits of deviation ; it is limited to land which is described in the books of reference and in the Parliamentary plans : *Finck v. London and South-Western Ry.* (1890), 44 Ch. D. 330.

(ix.) Diversion of road (*see* sect. 16, Railways Clauses Act, 1845, *post*).

(x.) Destruction of right of way (*see* sect. 16, Railways Clauses Act, 1845, *post*).

(xi.) Where conflicting powers are given to two companies in respect to the same piece of land, the operations on the land by one of the companies will not be restrained at the instance of the other, where the latter's powers have expired or where they have delayed to put their powers in force.

Illustrations.

(1) Two railway companies obtained powers to take (*inter alia*) the same land, and each gave a notice to treat, but nothing further was done to acquire the property. The powers

of the plaintiff company having expired :—*Held* that, assuming Parliament to have given a preference to the plaintiff company, the Court did not grant interlocutory injunctions where there were questions to be decided as to the legal exercise of the right at the time : *Bristol and North Somerset Ry. v. Somerset and Dorset Ry.* (1874), 22 W. R. 601.

(2) By an Act of 1884 the defendants were authorised to take certain lands, and, among them, lands over which the plaintiff company had powers of purchase, under earlier Acts than that of 1884. The plaintiffs moved to restrain the defendants from taking these lands, but the injunction was refused, Chitty, J., holding that the Act of 1884 was a specific enactment enabling the defendants to acquire the particular lands, and that there was nothing to prevent them from exercising that statutory power. If by any error the plaintiff company had no notice of the defendants' application for Parliamentary powers, the lands were equally bound by the Act of 1884, for if the plaintiffs had a right to such notice, that was an oversight of the Legislature for which the defendants were not responsible : *Regent's Canal Co. v. London School Board* [1885] W. N. 4.

- (xii.) All conditions precedent the performance of which is required by the special Act must be fulfilled before the promoters can take the lands, but a prohibition against taking land until conditions are complied with does not prevent the promoters taking any proceedings prior to conveyance.

Illustrations.

(1) The special Act authorising the construction of a railway from L. to B. contained a clause providing that the company should not, without the consent of J. G. and W. G., or the owner for the time being of certain lands, mills and buildings, construct the railway nearer to the said mills or buildings or any of them than a certain point. The company began the construction of the railway in a line parallel to the original line at the distance named, but passing through some of the lands belonging to J. G. and W. G., which, however, were separated from the lands on which their works were situated by a private road :—*Held*, that the company had no right to make a railway through the lands until they had entered into an agreement with J. G. and W. G. : *Gray v. Liverpool and Bury Ry.* (1846), 9 Beav. 391.

(2) A special Act (which incorporated the Lands Clauses Act) provided that before the Metropolitan Board of Works should, without the consent of a Secretary of State, "take for the purposes of this Act." fifteen houses occupied by the working classes, they should prove to the satisfaction of the Secretary of State that proper accommodation had been provided elsewhere for the same number of persons as had been housed in the premises to be taken. The Board served upon S. notice to treat as to more than fifteen houses belonging to him which were occupied at the date of the passing of the Act by the working class. S. sent in his claim without prejudice to any question as to the right of the Board to exercise their powers before complying with the special Act. The Board served notice of intention to summon a jury. S. brought his action to restrain the Board from proceeding on their notices until they had complied with the conditions :—*Held*, by Jessel, M.R., and Bowen, L.J., that the prohibition against "taking" the land until the conditions had been fulfilled did not prohibit the Board from taking before such compliance any proceeding prior to conveyance. Jessel, M.R., giving no opinion whether they were prohibited from taking a conveyance or only from taking possession, and Bowen, L.J., holding that the getting a conveyance from the landlord without entering into possession came within the meaning of the word "take" : *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142.

- (xiii.) Express words are necessary to enable one company to take land actually in the occupation of another.

Illustrations.

(1) The S. W. Railway Co., being empowered to take and purchase lands and to construct a railway according to the plans and books of reference deposited under the local and personal Act, gave notice to the L. Railway Co. that they required a small piece of land, on part of which the L. Railway was actually made, such piece of land being set out in the plans and books of reference as part of the projected line of the S. W. Railway, but afterwards they refused to issue their warrant to the sheriff to assess the purchase-money, on the ground that the L. Railway Co. had no power under their Act to sell any portion of land on which their railway had been constructed:—*Held*, on *mandamus* to the S. W. Company to issue their warrant, that, as there was no express clause in any special or general Act which empowered either the L. Company to sell any part of their actual line of railway or the S. W. Company to purchase it, the authority was not to be implied from the general power given to the S. W. Company to make their line, and to purchase lands according to their deposited plans and books of reference: *R. v. South Wales Ry.* (1850), 14 Q. B. 902.

(2) A railway company having acquired a legal right to, and the possession of, land, and constructed their railway thereon by virtue of their statutory powers, another railway company to whom powers had been granted to purchase the same land for the purposes of their undertaking, was restrained by injunction from exercising such powers pending the trial of the legal question as to the effect of these conflicting powers: *Manchester, Sheffield and Lincolnshire Ry. v. Great Northern Ry.* (1851), 9 Hare, 284.

(3) By a local Act the Corporation of London had power to construct a viaduct over Holborn Valley and to make certain streets and to acquire lands for the purposes of the Act. Sect. 36 enacted that in any case in which the Corporation might require to take any lands already purchased by the L. C. and D. Railway and that company were unwilling to dispose of the same or required them for the purposes of their railway, it should be referred to arbitration in manner thereinbefore provided: provided always that this provision should not be construed to prevent the Corporation taking all such lands of the railway company as might be required for the construction of the viaduct or raised way of the line of the new streets authorised by the Act:—*Held*, that the latter provision did not apply to a case where the Corporation required to take a piece of land already purchased by the railway company, but did not require the same for the construction of the actual roadway or footways of the viaduct or new streets: *London, Chatham and Dover Ry. v. London Corporation* (1868), 19 L. T. 250.

(4) In the absence of express power conferred by Act of Parliament it is not competent to one railway company to take or buy from another railway company, or for the latter to sell, portions of the land already acquired by the latter company and forming part of its undertaking: *Dublin and Drogheda Ry. v. Naran and Kingscourt Ry.* (1871), Ir. R. 5 Eq. 393, 399 (*per* Chatterton, V.-C.).

(b) Lands authorised to be taken and required for the purposes of the Act.

- (i.) The term “lands” in sect. 18 does not include incorporeal hereditaments; promoters cannot therefore, in the absence of express words in their special Act, compel an owner of property to grant them an easement.

Illustrations.

(1) Where a railway company had given notice to take part of a manufactory and were required to take the whole under sect. 92 of the Lands Clauses Act:—*Held*, that they

could not escape from the necessity of so doing by changing their plan and passing under the part comprised in their notice by a tunnel, whether such an act would amount to taking a part of the manufactory or not: *Sparrow v. Oxford, Worcester and Wolverhampton Ry.* (1852), 2 De G. M. & G. 94. "The only remaining question is one which has been raised now at the hearing for the first time, viz., that although the company have given a notice, in the ordinary way, that they mean to take the land, they are now entitled, if they cannot take the land, to burrow under it, by making a tunnel which they say they are able and willing to do, without taking or touching any part of the surface. A great number of arguments in support of this view were urged upon us. It was said, Suppose the manufactory was at the top of the hill and you were burrowing under it at the distance of 1,000 feet, are you then taking part of the manufactory? I do not feel myself called upon to answer that question; but if I were, I should incline to the opinion that you are, on the principle of the maxim, 'Cujus est solum ejus est usque ad inferos': per Lord Cranworth, at p. 108, *ib.*

(2) "But the Legislature did not mean that if I have a field free from any right of way I shall be bound upon any compensation to substitute for that a field subject to a right of way; if it is to be taken from me, it must be taken *in solido*": per Lord Cranworth, C., in *Pinchin v. London and Blackwall Ry.* (1854), 5 De G. M. & G. 851. See observations in *Great Western Ry. v. Swindon and Cheltenham Ry.*, 9 App. Cas. at p. 802, cited *infra*.

(3) "First of all, the preamble begins, 'With respect to lands acquired by the promoters of the undertaking.' It has been decided that the word 'lands' does not include an easement. The promoters of the undertaking have no right to require an owner to sell them an easement. Then the preamble speaks of lands "acquired" not being "required." Is not the word 'lands' to have the same meaning in both branches of the sentence? There is only one word used, that is, 'lands,' and it must mean the same thing throughout": per Jessel, M.R., in *In re Metropolitan District Ry. and Cosh* (1880), 13 Ch. D. at p. 616.

(4) A School Board gave F. notice to treat for land forming part of a building estate, including a proposed road leading to the required land. The purchase and compensation money was afterwards agreed at 8,000*l.* "for the purchase of the estate and interest of F. in the land and hereditaments," also as "compensation for all damage sustained by severance or otherwise by reason of the exercise" of the statutory powers. F. afterwards informed the School Board that it was not intended to form the proposed road shown on the scheduled plan, and suggested a modification of the boundary, the reason being that the road was part of his original scheme for developing his property as a building estate, but that, in the altered circumstances, it would not be worth his while to make the road. The School Board thereupon applied for a declaration that they were entitled to a conveyance of the piece of land specified in their notice to treat, with frontages to A. and B. Roads and the proposed road:—*Held*, that the Board had acquired no rights over the land adjacent to that purchased; that they had no power to acquire easements under their compulsory powers which did not extend to the compulsory acquisition of easements, but only the right to acquire the land itself; that the reference in the notice to treat to the proposed road was mere description, and that the road could not be treated as a road actually made: *In re London School Board and Foster* (1903), 87 L. T. 700.

- (ii.) Promoters may, however, agree to purchase a limited right, such as an easement, if the landowner is willing to grant same.

Illustration.

"I can see no reason for holding that in sect. 7 and other clauses of the Act which relate to purchase by agreement, the word 'lands' must be restricted to corporeal hereditaments. If a landowner is willing to sell a right of use, and such a right is sufficient

for all purposes sanctioned by the special Act, I cannot conceive that it was the intention of the Legislature to enact that the landowner should not sell or the company purchase, that limited right": *per* Lord Watson in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. 787.

- (iii.) If promoters have been expressly authorised to acquire an easement only, they thereby acquire an interest in land, and must give notice to treat to those interested in the property affected.

Illustrations.

(1) A railway company was authorised by a special Act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such an easement could not be acquired by the company without material detriment to the rest of the land in question:—*Held*, that the company might enter upon the land for the purpose of making the tunnel under sect. 85 of the Lands Clauses Act upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land: *Hill v. Midland Ry.* (1882), 21 Ch. D. 143.

(2) "In the . . . case of *Hill v. Midland Ry.* [*ante*, p. 16], where the company had power by their special Act to acquire (except in a certain event which had not occurred) a right or easement of precisely the same character as that which the respondent company are authorised to take for the purpose of crossing the appellants' Gloucester line, Fry, J., held that such right or easement was, by reason of its having been made the subject of compulsory acquisition by the provisions of the special Act, brought within the scope of the statutory definition of the word 'lands' as occurring in sects. 18 and 85 of the general Act. The only authority to the contrary which was relied on for the respondents was *Pinchin v. London and Blackwall Ry.* (1854), 5 De G. M. & G. 851. The observations made by Lord Cranworth in that case are entitled to the greatest respect; but I agree with Cotton, L.J. (22 Ch. D. 706), in thinking that these observations were directed to the question whether the word 'lands' in sect. 18 of the Lands Clauses Act, apart from any peculiar powers conferred by the special Act, includes an easement. What the noble and learned lord, as I understand him, did say was that the context of the general Act forbade the application of sect. 18 to 'lands' which were not corporeal hereditaments—a proposition which I do not think it necessary to dispute": *per* Lord Watson in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. at p. 802.

(3) The M. Railway Co. were authorised by their special Act to make their line by way of tunnel, and they were not required wholly to take lands under any street, but might appropriate and use the subsoil and under-surface of the street. Under these powers the company made a tunnel under a certain street:—*Held*, that the word "appropriate" clearly pointed to a right of property becoming vested in the company, and that they did not take merely an "easement," but an interest liable to land tax: *Metropolitan Ry. v. Fowler*, [1893] A. C. 416. "To appropriate, according to its natural meaning, is to take and keep a thing by exclusive right; and, as I construe their Act, the authority which it confers upon the company is, to take and exclusively possess as much of the subsoil below highways as may be 'required for the purposes of the undertaking.' There is no substantial distinction between the interest which they get by appropriation and that which they acquire by purchasing in terms of the Lands Clauses Act. It may be that if their railway undertaking was wholly abandoned, their statutory title to the subsoil of highways would cease and the land which they possess by virtue of it would revert to the original owner": *per* Lord Watson, at p. 426, *ib.*

(4) A company was empowered to construct a railway consisting wholly of tunnels, and it was enacted that they should not be required to take any lands entirely or any part of

the surface thereof or any buildings thereon or any vault or cellar, &c., held therewith or forming part of the same, but should be at liberty to appropriate and use the subsoil, without prejudice, however, to their liability to make compensation under sect. 68 of the Lands Clauses Act. The plaintiff received notice that the company required to appropriate and use the subsoil under his property as shown on an accompanying plan. The company did not, however, serve any notice to treat, or offer or deposit any compensation, or give any bond, as required by the Lands Clauses Act :—*Held*, that the company were taking, not merely an easement, but “land”; that “appropriate” meant the same thing as “purchase,” *i.e.*, taking the subsoil for the company’s exclusive possession; and that therefore the company must comply with the provisions of the Lands Clauses Act : *Farmer v. Waterloo and City Ry.*, [1895] 1 Ch. 527.

- (iv.) There are, however, cases where the acquiring of an easement, though authorised, may not be a taking of “land,” as where it is expressly provided by the special Act that no land shall be taken.

Illustration.

“In determining this case we cannot separate the two privileges created by sect. 8 of the special Act; and can it be said with accuracy that the privilege of constructing a bridge on their own land and carrying its one span of seventy-five feet through the air over the railway of the plaintiff company is the taking of land or of any messuage or tenement, or of any hereditament known to the law? I think that the only answer to this must be in the negative, notwithstanding the legal maxim, “*Cujus est solum ejus est usque ad cælum et ad inferos.*” The ownership of land carries with it as one of its natural incidents the right to the air in a line above it, *usque ad cælum*, but the air is not land. As to the other privilege of driving a tunnel under the plaintiff company’s railway and through their soil, it is to be borne in mind that, although the defendant company is authorised to interfere with the land of the plaintiff company by constructing the tunnel, they are prohibited from taking or acquiring any land of the plaintiff company and part of the structure of their line. The defendant company gets the privilege to construct, and, when constructed, the further privilege of running their rails and carrying their trains over the floor of that arch or tunnel, but the arch itself becomes, and the *solum* remains, the property of the plaintiff company”: *per* Lord Fitzgerald in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. at p. 795.

NOTE.—The special Act in this case really gave the promoters a statutory licence; the case is an exceptional one.

- (v.) If the easement be taken over land the surface of which is a highway, the owner of the land is, nevertheless, entitled to have notice to treat, unless provision for the case has been expressly made in the special Act.

Illustrations.

(1) *Declaration* in trespass. *Plea*, that the plaintiff’s close was a public highway and that the defendants had entered for the purpose of making a tunnel thereunder, as they lawfully might. *Replication*, that the close was required for the permanent use and maintenance of the railway, and that the plaintiff had given no consent to the defendants’ entry, nor had they given the plaintiff any notice to sell and convey or that they required the said close; nor had the defendants paid to the plaintiff or into the bank any purchase-money or compensation, and that the defendants’ occupation was permanent :—*Held*,

that the plea afforded no justification, for the defendants were bound to make compensation before entry: *Ramsden v. Manchester, &c., Ry.* (1848), 1 Ex. 723.

NOTE.—A *cul-de-sac* is a public highway, and in the following case it was assumed that the company had power to take the subsoil of public highways without compensating the owners of land adjoining for the part of the street taken.

(2) S. was the owner of a piece of ground with two rows of houses which had existed for more than twenty years, with a passage sixteen feet wide between them ending in a *cul-de-sac*, the whole of the soil of which had been conveyed to him. A railway company, under the powers of their Act, gave notice to treat for some of the houses on each side, but the soil of the passage between the houses was expressly excluded from the notice. The railway was to be carried in a tunnel under the property. Evidence tending to show dedication being given, the injunction to restrain the company from entering on the *cul-de-sac* without giving notice to treat was dissolved: *Souch v. East London Ry.* (1873), L. R. 16 Eq. 108. "A *cul-de-sac* has frequently been decided to be a public highway. These houses have been built more than twenty years, and the passage has been left open to the public, who have been allowed to enter night and day whenever they thought fit. That amounts to a dedication to the public, and it makes a way or street so opened a public one. I apprehend, and I am perfectly clear in my opinion, that the company have just the same right over it as they have over any other street running out of Victoria Street under which they are empowered to carry their line": *per* Malins, V.-C., at p. 111. This case subsequently came on for trial before Bacon, V.-C. (22 W. R. 566), who *held* that whether the passage was a private or a public way did not affect the question.

(3) The defendant laid certain water-pipes along a highway and in the soil of the side of a road adjoining the land of which the plaintiff had an undivided moiety. The plaintiff served a notice upon the defendant not to lay pipes in his lands, and that he should apply for an injunction restraining the continuance of the pipes in his soil, which injunction was afterwards granted, the owner of the soil not being left to his remedy at law nor required to establish his right at law: *Goodson v. Richardson* (1874), L. R. 9 Ch. 221. "It is undoubtedly true that, where a legal remedy exists, this Court, in determining whether it will leave the parties to that legal remedy or will interfere by injunction, has regard to the circumstances of each particular case, and amongst those circumstances are, no doubt, the time at which the work was executed, and also what will be the result to the parties of the interference of the Court, on the one hand, or of leaving them to their legal rights and liabilities, on the other hand. But I apprehend that the Court has nowhere said that when a trespass of this kind has been committed under circumstances at all similar to those in the present case, the mere fact of the trespass being complete at the time when the bill was filed will prevent an injunction against the continuance of the trespass. The plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take that soil for such a purpose, except under contract with the owner or with his consent. At the same time the plaintiff has not the right of an unlimited owner in respect of that soil, because the upper surface is dedicated to the public for the purpose of a public highway, which is under the management of local authorities; and the plaintiff cannot use the soil or deal with it by breaking it open, or in any other manner so as to interfere with the use of it by the public for the purpose of a highway": *per* Lord Selborne, C., at p. 223, *ib.*

(vi.) The taking of a whole stream is equivalent to the taking of "land," and the promoters must, in the absence of agreement, give notice to treat in respect of the same. It is otherwise where there is an injurious affection of a part of a stream; in this case the owner's remedy is under sect. 68.

Illustrations.

(1) The diversion of a stream is a "taking and using" of it within the meaning of sect. 85 of the Lands Clauses Act, which is incorporated in the Waterworks Clauses Act (and which latter Act introduces the word "streams" as well as "lands"), and before such diversion can be made, the value of the stream must be ascertained and secured to the owner of the land through which it passes: *Ferrand v. Bradford Corporation* (1856). 21 Beav. 412; followed in *Stone v. Yeovil Corporation*, *infra*. "But the Lands Clauses Consolidation Act is made a part of this special Act of Parliament, as far as it is applicable; but not merely that: the Waterworks Clauses Act is also made a part of this Act of Parliament for the same purpose. Now, the Waterworks Clauses Act re-enacts the clauses of the Lands Clauses Consolidation Act *totidem verbis*, but with this addition, that it introduces the word 'streams' as well as the word 'lands.' Now, observe how that alters the case: it enacts that 'they shall make to the owners and occupiers of, and all other parties interested in, any lands or streams, taken or used for the purpose of the special Act or injuriously affected by the construction or maintenance of the works thereby authorised, full compensation for the value of the land and streams so taken or used, and for all damage sustained by such owners, occupiers or other persons, by reason of the exercise, as to such land and streams, of the powers vested in the undertakers by this or the special Act or any Act incorporated therewith.' Now, this clause expressly makes the same distinction with respect to the streams which the Lands Clauses Consolidation Act does with respect to lands, that is to say,—if you take the stream you must pay the whole price of it, if you injuriously affect the stream, then that clause does not apply. But when you have injuriously affected the stream, compensation in damages must be made, in accordance with the ordinary mode; so that the distinction is quite clear": *per Romilly, M.R.*, at p. 419, *ib*.

(2) B. was owner of a meadow which was irrigated by a certain brook. The T. Waterworks Co., under their statutory powers, took water from the brook two miles above the meadow and thereby diminished the flow of water:—*Held*, that sect. 6 of the Waterworks Clauses Act did not entitle B. to compel the company to purchase her interest in the stream, but that B. was only entitled to compensation as a person whose interests were injuriously affected: *Bush v. Trowbridge Waterworks* (1875), L. R. 19 Eq. 291, distinguished in *Stone v. Yeovil Corporation*, *infra*.

(3) "The present case is, however, plainly distinguishable from that of *Bush v. Trowbridge Waterworks*. In the latter case the water company took power to divert only a portion of a brook which flowed through the plaintiff's land, and though the portion abstracted prevented the stream from being of the same practical benefit in the way of irrigation to the plaintiff which it had been before, the brook or stream, though seriously diminished in quantity, continued to run through the land as before, and it is upon this that the judgments of the Master of the Rolls and the Lords Justices appear to have proceeded. In the present case the corporation have taken power to divert the whole body of the stream, and given notice to the plaintiff of their intention to do so, and the case comes within the principle of the decision of Lord Romilly in *Ferrand v. Corporation of Bradford*, which is by no means overruled by or inconsistent with the decision in the case of the *Trowbridge Waterworks Co*. Under these circumstances the plaintiff becomes entitled under the 8th section of the local Act and the 6th section of the Waterworks Clauses Consolidation Act, 1847, to compensation for the value of the entire stream, and not merely to compensation proportioned to the degree in which his land may be injuriously affected by each partial abstraction of the water": *per Cockburn, C.J.*, in *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99 at p. 107.

(vii.) If in the taking of lands there is an interference with an easement, no notice to treat as to the easement is required, the owner's remedy being under sect. 68 (*see* sects. 68 and 84).

(c) Lands which the promoters "require" for the purposes of the undertaking.

- (i.) Every work the company is empowered to carry out is a "purpose" ;
- (ii.) If there is more than one way of carrying out the purposes of the undertaking, and one of them requires the purchase of land, the company may in a proper case purchase it.

Illustrations.

(1) A railway company gave notice to treat as to the whole of a plot of land numbered upon their plans. The owner objected upon the ground that the purchase of a part only would be sufficient for the construction of the proposed line, as shown upon the plans. The company required the land for a station, sidings, &c., and other works connected with the proposed line, but not shown upon their plans :—*Held*, that the company were entitled to take the whole plot : *Cotter v. Midland Ry.* (1848), 5 Rail. Cas. 187. "It seems to me, therefore, sufficiently clear that these provisions do include ample power for these purposes. The term "railway" by itself includes all works authorised to be constructed, and for the purpose of constructing the railway, the company are authorised to construct such stations and other works as they may think proper ; and, assuming that the lands authorised to be compulsorily taken would be taken and used for all ordinary stations and works, the Act provides that, for extraordinary purposes, such as additional stations and conveniences, this railway may purchase certain additional quantities of land. I consider that all land authorised to be taken as necessary in the terms of the Act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether necessary for the actual line of the railway or for stations or other conveniences necessary for the working of the railway. The purposes for which the plaintiff's land is proposed to be applied clearly fall within that description" : *per* Lord Cottenham, C., at p. 194, *ib.*

(2) "Every work which the company is empowered to do is a purpose. I do not mean what they are compelled to do, but what they have a power to do. But in this case we are considering the work under the 68th section which they are compelled to do, that is they are compelled to make good the interruptions. If they are compelled to make good the interruptions, and there are two or three ways, why may they not choose which way they will do it, and if one of the ways requires to purchase some of the lands within the limit of their powers, why should they not buy the land ? It is exactly within the purview of the Act and to carry out one of the purposes of the Act" : *per* Jessel, M.R., in *Wilkinson v. Hull, &c., Ry. and Dock* (1882), 20 Ch. D. at p. 333.

- (iii.) The burden of showing that the property proposed to be taken is required is upon the promoters.

Illustrations.

(1) By the Metropolitan (General) Paving Act, 1817, the Commissioners of Sewers of the City of London were authorised to improve and widen the thoroughfares of their district, and to that end to acquire from the owners any buildings or lands or any part of such buildings or lands which might be necessary for the purpose. It was for the commissioners to adjudicate as to the work to be carried out and as to the property to be taken. The

commissioners adjudged that it would improve Threadneedle Street if a piece of land, parcel of the site of a certain house, were made part of the street ; and, accordingly, notice was served requiring the whole of the said house :—*Held*, that although it was competent to the commissioners to adjudge that the whole of a building was an obstruction and should be acquired, yet, the resolution being that part of the house was necessary for the proposed work, they could not, without the owner's concurrence, acquire the whole : *Thomas v. Daw* (1866), L. R. 2 Ch. 1.

(2) In May, 1867, the compulsory powers conferred on a railway company by an Act of 1864 having nearly expired, the railway company gave notice to L., under those powers, of their intention to take part of his land. L. entered into negotiations with the company, but afterwards discovered that the greater part of the land included in the notice was not required for any of the purposes of the Act of 1864, but for the purposes of making a new street connecting A. Street with U. Street, which they were bound to do as a condition of stopping up A. Street. L. thereupon filed his bill for an injunction restraining the company from taking any of the land comprised in their notice, on the ground that they had no power to take any of his land compulsorily except for the purposes of the Act of 1864 :—*Held*, that L. was entitled to an injunction, the stopping up of A. Street not being one of the purposes of the Act of 1864 : *Lamb v. North London Ry.* (1869), L. R. 4 Ch. 522.

- (iv.) Where the promoters are authorised to take for the purposes of their undertaking any lands specially described in the special Act, the Legislature constitutes them the sole judges as to whether they will or will not take those lands, provided they act *bonâ fide* and reasonably with the object of using the land for the purposes authorised.

Illustrations.

(1) A railway company was desirous of taking certain lands for the purpose of the undertaking. The owner refused to sell, on the ground that the lands were not required for the undertaking. The Court referred the question to an engineer, who decided in favour of the owner :—*Held*, by the House of Lords, that so long as the company acted *bonâ fide* under statutory powers, its decision as to what was required was conclusive : *Stockton and Darlington Ry. v. Brown* (1860), 9 H. L. Cas. 246 ; approved in *Kemp v. South-Eastern Ry.* (1872), 41 L. J. Ch. 404. "I think it clear that when the Legislature authorises railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands ; provided only that they take them *bonâ fide* with the object of using them for the purposes authorised by the Legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers" : *per* Lord Cranworth at p. 256, *ib.*

(2) G. owned two houses in W. Street in fee. These and neighbouring houses were burnt ; only the outer walls remained standing. The commissioners of sewers adjudicated that W. Street should be widened, and that the two houses and the land on which

they stood projected into and prevented them from widening W. Street, and gave G. notice to treat for the whole of the two houses. It appeared that the commissioners did not intend to use more than five and a half feet for the widening, but intended to sell the rest of the houses without allowing any right of pre-emption to G. :—*Held*, that the power of adjudicating property necessary to an improvement must only be exercised where the circumstances of the case fairly warrant such a proceeding; that the adjudication in the present case was *ultra vires*; and a perpetual injunction was granted to restrain the commissioners from proceeding on their notice to treat : *Gard v. Sewers Commissioners of London* (1885), 28 Ch. D. 486. "Now, first of all, with regard to the finality of the adjudication. Supposing that the commissioners are not entitled to take the whole when they only want a part, it seems to me to be obvious that they *cannot*, by simply asserting what is admittedly an untruth, clothe themselves with jurisdiction. They have no doubt a right to take what is necessary for their purposes; but the adjudication must bear some relation to reason. I do not say they must always be right, but there must be a probable ground which a reasonable person could take in support of their decision. If they have not the right to take the whole when they do not want it, their saying that they want the whole when, in the same breath, they admit that they only want one-fourth of it will not help them. The circumstances would not in such a case be reasonably consistent with an adjudication that it was necessary to take the whole" : *per* Bowen, L.J., at p. 708, *ib*.

(3) An adjudication by city commissioners that a certain property is required for the purpose of alterations cannot be supported if there are no grounds on which any reasonable person could come to the conclusion that it was so required : *Lynch v. Commissioners of Sewers* (1886), 32 Ch. D. 72.

- (v.) The statement of the promoters' engineer as to what land is "necessary for the purposes of the company" will be accepted by the Court as conclusive, if made in good faith, and if it shows the purposes for which the statutory powers are to be exercised.

Illustrations.

(1) By a special railway Act it was provided that the company might enter upon, take and use such of the lands delineated and described in the plans and books of reference "as they thought necessary for the purposes" of the Act :—*Held*, that an affidavit of the engineers that certain land *was or would be wanted* for the purposes of the Act was not sufficient; but the purposes must be specified so that the Court may judge if the land is required in good faith : *Flower v. London, Brighton and South Coast Ry.* (1865), 2 Dr. & Sm. 330.

(2) The engineers of a railway line acting *bonâ fide* are to be taken as conclusive judges of what is and what is not "necessary for the purposes of the company" : *per* Lord Hatherley, C., in *City of Glasgow Union Ry. v. Caledonian Ry.* (1871), L. R. H. L. Sc. 160 at p. 164.

(3) "What Vice-Chancellor Kindersley decided in the case of *Flower v. London and Brighton Ry.*, 2 Dr. & Sm. 330, was that the mere *ipse dixit* of the engineer was not sufficient: he must point out *how* the land was required. It is most important that the principle in *Stockton and Darlington Ry. v. Brown*, 9 H. L. Cas. 246, making the statement of the engineer of the company conclusive, should be maintained so as to save the Court from a flood of affidavits with which it would otherwise be deluged" : *per* Lord Hatherley, C., in *Kemp v. South-Eastern Ry.* (1872), 41 L. J. Ch. at p. 407.

(4) "But where the engineer says it is wanted for the purposes of the railway . . . it is what the engineer says which is the important point; where the engineer says that he wants it, unless you can show that that is an assertion made *malâ*

fide, it is binding upon the Court. And how could you show that it was made *malâ fide*? If you could show that it was palpably, on the face of it, absurd, as in the case put by the Lord Chancellor,—if the railway engineer were to say, ‘We want to build a station which shall be according to a plan which we now give you notice of, which would really occupy half an acre, nevertheless I require you to sell me 200 acres,’ then as to all but the half acre it would clearly be shown to be so unreasonable that it could not be *bonâ fide* asked for the purposes of the railway”: *per* Brett, L.J., in *Errington v. Metropolitan District Ry.* (1882), 19 Ch. D. at p. 577.

(5) A similar provision is contained in sect. 15 of the Public Health Act, 1875 :—*Held*, that the word “necessary” means “necessary for the effectual discharge of the duty in the way most for the benefit of the public.” The person to determine the necessity is the surveyor, and if his determination has been arrived at by a *bonâ fide* exercise of his judgment, the Court will not interfere, even though there were other practicable courses of construction, which would not have made the entry on private land requisite: *Lewis v. Weston-super-Mare Local Board* (1888), 40 Ch. D. 55.

NOTE.—The evidence of the engineer will not be admitted as to the meaning of the deposited plans.

Illustration to Note.

In considering what land a railway company is authorised by its Act to acquire, evidence of engineers, as experts, as to the meaning of the deposited plans, will not be admitted; but evidence may be admitted as to the existence of boundaries beyond those shown on the plans: *Dowling v. Pontypool, Caerleon and Newport Ry.* (1874), L. R. 18 Eq. 714.

- (vi.) Land required for the purpose of obtaining or supplying materials for the works is not land required for the purposes of the undertaking, and cannot be taken.

Illustrations.

(1) An estuary company was by its Act, which incorporated the Lands Clauses Act, empowered to make and maintain certain cuts and works and to enter upon, take and use such of the lands delineated in the deposited plans as might be necessary for that purpose:—*Held*, that the company were not entitled to take compulsorily land which was required, not for the site of the cuts or works, but to supply materials for the execution of works on other land: *Bentinck v. Norfolk Estuary* (1857), 8 De G. M. & G. 714. “The Act by which this company was constituted incorporated the Companies Clauses Act and the Lands Clauses Act, but it does not incorporate the Railways Clauses Act. The Railways Clauses Act contains provisions under which lands may be entered upon, occupied and used for the purpose of obtaining materials for the construction of the works, but neither the Companies Clauses Act nor the Lands Clauses Act contains any such provisions. These three Acts may well be considered to form part of a general scheme of legislation. The incorporation of the two latter Acts and the non-incorporation of the former is, I think, strong to show that the powers contained in the former which are not contained in the latter were not intended to be given to this company. That it was not so intended is, I think, more evident from the circumstance that some of the clauses of this company’s Act appear to be taken from the Railways Clauses Act. The adoption of some and the non-adoption of others of the provisions of that Act is surely strong evidence that those which were not adopted were not meant to apply. We are bound, therefore, as I think, to consider that the Legislature did not mean directly to give this company the power of entering upon, occupying or using lands for the purpose of obtaining materials for the construction of their works. Can we then suppose that the Legislature intended *indirectly* to give this power by enabling the company to purchase lands for the purpose? Very strong and clear language would, I think, be required to warrant this conclusion, more

especially as acts of this description are to be construed in favour of the landowner and not of the company. The question comes to this. Do the company's Acts contain provisions so strong and clear as to justify us in imputing this intention to the Legislature. I think it plain that they do not" : *per* Turner, L.J., at p. 723, *ib*.

(2) By a special Act, which incorporated the Lands, Railways, and Companies Clauses Acts, a company was granted powers to make and maintain the works mentioned in it, and to enter upon, take and use such of the lands specified in the plans as should be necessary :—*Held*, that these provisions did not enable the company to take compulsorily and permanently land required only for the purpose of excavating materials for the works therefrom, although scheduled and within the limits of deviation, and an injunction was granted to restrain the assessment of the value of the land : *Eversfield v. Mid-Sussex Ry.* (1858), 3 De G. & J. 286.

- (vii.) If the land which promoters are seeking to take is not at the time, but afterwards becomes, necessary for the purposes of the undertaking, the Court will not interfere to restrain them from taking it.

Illustrations.

(1) A railway company had attempted to acquire, under its statutory powers, lands not really required for the undertaking. Subsequently, however, the purposes of the undertaking required the purchase of the land. The Court refused to interfere to prevent the company from acquiring the lands : *Webb v. Manchester and Leeds Ry.* (1839), 4 Myl. & Cr. 116 ; 48 R. R. 28.

(2) A railway company, having completed their main line, entered into terms for carrying the coal belonging to a large owner, who made a private railway up to their limits of deviation. The company then, on their own limits of deviation, constructed a siding so as to open communication with their main line, and, in so doing, took land belonging to D. :—*Held*, that they had acted within their powers : *In re Yorkshire Doncaster and Goole Ry., In re Dylar's Estate* (1855), 1 Jur. (N.S.) 975.

(3) A railway company gave notice to treat as to certain lands included in their schedule. They required the lands in question for the purpose of depositing spoil and materials. It was uncertain whether the lands would subsequently be required for the purposes of the line. The Court refused to grant an injunction restraining the company from acquiring the lands. Upon appeal, however, to the Lords Justices, the order of Romilly, M.R., was discharged, and the motion ordered to stand to the hearing upon an undertaking in the meantime by the company not to proceed under the later of the notices given to L., who undertook not to take proceedings for the forfeiture of certain leases : *Lund v. Midland Ry.* (1865), 34 L. J. Ch. 276.

- (viii.) If compulsory powers have been obtained for a certain undertaking, those powers cannot be used for another undertaking.

Illustrations.

(1) Land was vested in commissioners under an Act for draining fens. The commissioners made a drain and threw up the excavated soil so as to form a broad bank on one side thereof. It was *held* that it was not inconsistent with the purposes prescribed by the Act for the commissioners to dedicate part of the bank as a public highway : *R. v. Leake (Inhabitants)* (1833), 5 B. & Ad. 469.

(2) A landowner is entitled to an injunction to restrain a company from using lands, acquired by them from him under their compulsory powers, for purposes not contemplated by the Act, if such use affects the comfort and enjoyment of the remainder of his estate: *Bostock v. North Staffordshire Ry.* (1856), 3 Sm. & G. 283.

(3) A waterworks company were about to lay down certain pipes alleged by them to be necessary for the supply of C., but which they admitted were intended for the purpose, beyond the limit of their powers. Upon the application of the local authority the waterworks company were restrained from laying down pipes under the streets of C. for the purpose of supplying with water any place not being part of the port of C. or any place within or adjoining such town: *Cardiff Corporation v. Cardiff Waterworks* (1859), 5 Jur. (N.S.) 953; *Lee v. Milner* (1837), 2 Y. & C. 611; 47 R. R. 463, followed, *ante*, p. 119.

NOTE 1.—Land acquired under statutory powers for the purposes of an undertaking may be dedicated to the public for use as a highway, provided that the use by the public is not inconsistent with the statutory purposes of the undertaking.

Illustrations to Note 1.

(1) A canal company under statutory powers acquired land for a towing-path. The use of the land as a public footpath was not inconsistent with its being used as a towing-path by the company. It was *held* that the company could dedicate the land for a public footpath subject to the user by the company as a towing-path: *Grand Junction Canal v. Petty* (1888), 21 Q. B. D. 273.

(2) A canal company made reservoirs with embankments:—*Held*, that the company could not dedicate the embankments as a right of way to the public, if the user by the public must ultimately lead to the destruction of the embankment: *Great Western Ry. v. Solihull Rural District Council* (1902), 86 L. T. 852.

NOTE 2.—The power conferred upon railway companies by sect. 32 of the Railways Clauses Act to take temporary possession for the purpose of “forming roads thereon to or from or by the side of the railway” does not include taking for the purpose of forming a railway”: *per* North, J., in *Morris v. Tottenham and Forest Gate Ry.*, [1892] 2 Ch. 47.

(d) Lands taken for a subsidiary or collateral purpose.

- (i.) Whether a public body will be allowed to take the whole of the lands scheduled, although they are not actually required for the undertaking, depends entirely upon the construction of the special Act.

Illustration.

“Now, it must be observed that the Legislature, in providing for such an object as that of widening and improving the streets of the Metropolis, has to deal with a subject totally different from that of enabling a body of adventurers to form a railway. In that latter case the persons seeking the aid of Parliament are bound to show that what they are proposing to do is of such public importance as to make it reasonable that they should be enabled so far to interfere with the rights of private property as to compel the owners of the land required for the railway to sell it to them at a fair price. The Legislature has no concern with the question as to how the persons embarking in the undertaking are to obtain funds to pay for the construction of the railway. . . . But in the case of a public body, like the Mayor and Corporation of the City of London, undertaking improvements

in the Metropolis, the matter is very different. When they have made a new or widened an old street, they will necessarily have incurred a very great expense for which they can get no return. The new or improved street is dedicated to the public, and, unlike the railway, yields no profit to those by whom it has been made. In order to meet this difficulty and to enable corporations to reimburse themselves, the course has been to authorise them to take compulsorily not only the buildings actually necessary for forming the streets or other projected improvements, but also other neighbouring lands and buildings, the value of which, and the proper mode of dealing with which, the Legislature considers to be connected with and dependent upon the projected improvements : " *per* Lord Cranworth, C., at p. 45. An agreement made, before the Parliamentary powers were obtained, to sell a portion of the lands not actually required for the improvements was in that case *held* to be valid : *Galloway v. London Corporation* (1866); L. R. 1 H. L. 34.

- (ii.) A railway company, authorised to underpin buildings adjoining their line, will not be restrained from carrying out the work in such a way that, when completed, it will also serve the purpose of a retaining wall necessary for the support of the railway cutting, and which the company would otherwise have had to build.

Illustration.

S. owned a manufactory, shop, and stables ; the M. Railway Co. gave notice to treat as to the stables and yard adjoining, but were restrained from taking part of the property unless they took the whole. They then brought the line of the railway just outside the stable wall in a cutting, and gave notice to underpin the wall thereof. The company built a concrete wall five feet thick, the greater part of which was on S.'s land under the wall of the stable. This wall, when completed, acted as a side or retaining wall to the railway :—*Held*, that in fact what had been done was underpinning and not the construction of a retaining wall, and that the company had not exceeded their powers : *Stevens v. Metropolitan District Ry.* (1885), 29 Ch. D. 60.

- (e) Nuisance necessarily caused by undertaking (*see* sect. 68).

- (f) The landowner may so assent to the company taking his land that he is bound to sell.

Illustrations.

(1) An engine-house was erected by M. on the land of S. for the purpose of working a railway. The railway had been constructed under statutory powers, but the erection of the engine-house was not authorised :—*Held*, that after acquiescence on the one side and an undisturbed enjoyment on the other for a number of years, the possession ought not to be disturbed, but that proper compensation must be assessed and paid : *Mold v. Wheatcroft* (1859), 27 Beav. 510.

(2) A municipal corporation, before applying for statutory powers, served upon J. the usual notice to owners, lessees, and occupiers of their intention to apply for power to take a portion of the farm. The schedule to this notice contained the following description of the property proposed to be taken : "Property in the line of the proposed work as at present laid out (including property any part of which is within eleven yards or thereabouts of the centre line of such proposed work so delineated upon the plan)" :—*Held*, that the corporation were not by this description restricted from taking a greater total breadth than twenty-two yards, provided that what they took was within the limits of deviation prescribed

by their Act; *held also* that, after a reference to arbitration, J. was bound to sell all that was comprised in the notice to treat, whether it was or was not within the compulsory powers of the corporation: *In re Huddersfield Corporation and Jacomb* (1874), L. R. 10 Ch. 92.

(g) Definition of the word “take.”

The word “take,” as used in the Act, is not confined to the taking of actual possession. Its precise signification in different sections must be gathered from the context.

Illustration.

“Now I think it will be found that in the Lands Clauses Act the word ‘take’ is used in more than one sense. In the first section the word seems to be used in a general sense. That section says that the Act shall apply to every undertaking authorised by any Act which shall hereafter be passed and which shall authorise the purchase or taking of lands for such undertaking. In the preambles to sects. 6 and 16 a distinction is drawn between ‘purchase of lands by agreement’ and ‘the purchase and taking of lands otherwise than by agreement.’ In sect. 68 the word ‘taking’ occurs, and it is clear from *Burkinshaw v. Birmingham and Oxford Junction Ry.* (1850), 5 Ex. 475, that in that section ‘take’ means ‘actually take,’ as distinct from serving a notice to treat or any other kind of constructive taking. Looking at the Lands Clauses Act as a whole, and looking at common parlance and of the language of most Acts which give compulsory powers to public bodies, I think we may say that the word ‘take’ ought not to be confined to taking of actual possession”: *per* Bowen, L.J., in *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. at p. 173.

III. Notice to treat must be given to all parties interested in the lands or to the parties enabled by the Act to sell and convey or lease the same. These embrace:—

- (1) The owner of the fee ;
- (2) A tenant in tail ;
- (3) A tenant for life ;
- (4) A lessee or under-lessee ;
- (5) A mortgagee ;
- (6) The grantee of an annuity charged on the land ;
- (7) A person having only an equitable interest.

(a) Lessees.

- (i.) A tenant holding under a lease which contains a proviso enabling the landlord to resume possession, cannot after receiving a notice to treat be deprived of his right to compensation by a subsequent notice from the landlord of his intention to resume possession.

Illustration.

- (1) A lease contained a proviso enabling the lessor to resume possession for the purpose of building, &c., upon giving three months’ notice. Notice to treat was given to the lessee

and afterwards the lessor gave the lessee notice of intention to resume possession :—*Held*, that this notice was not a good notice within the proviso, and that the lessee was entitled to compensation from the company for his interest in the lands : *Johnson v. Edgware, Highgate and London Ry.* (1866), 14 L. T. 45.

(2) J. was the tenant of a clayfield under a lease which provided that the owner should be entitled "to resume and except from the clayfield any part of the lands at his pleasure." Before this power of resumption had ever been exercised a railway company acquired a part of the lands from the owner, whereupon the tenant claimed compensation :—*Held*, that the right of resumption had not passed to the railway company ; (by Lord Neaves) that, whether the railway company had acquired that right or not, they had taken possession under their statutory powers and subject to the statutory liability to an inquiry as to damages : *Solway Junction Ry. v. Jackson* (1874), 1 Ct. Sess. Cas. (4th series) 831 ; approved in *Fleming v. Newport Ry.* (1883), 8 App. Cas. 26.

- (ii.) If a new tenant has taken possession after notice to treat has been served upon his landlord, but without knowledge of the fact on the part of the tenant, he will, it seems, be entitled to notice to treat as to his interest.

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Illustrations.

(1) On June 25th, 1862, C. signed a proposal in writing offering to take from D. a lease of certain lands (a farm) for twenty-one years from Michaelmas, 1862, determinable at the end of seven or fourteen years. This proposal was accepted, and C. took possession. Shortly afterwards C. heard that a railway was to be made through the farm and that nearly eight acres thereof would be required. On March 5th, 1863, the railway company entered and began digging a trench on part of the farm. No notice had been given to C. In February, 1863, after the execution by C. of the counterpart of the lease of the farm, he called with his solicitor on the railway company's solicitors, who were then requested to serve a notice to treat upon C., but this the company refused to do. Upon motion to restrain further proceedings by the railway company on the land, *Stuart, V.-C.*, directed the motion to stand over until the hearing of the cause, the company undertaking to pay 500*l.* into court within a week in respect of the value of C.'s interest in the land, and to forthwith serve C. with notice to treat : *Carter v. Great Eastern Ry.* (1863), 8 L. T. 197.

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(2) The P. F. Company were entitled to the lease of a factory near the defendants' canal. In December, 1887, the defendants served a notice to treat upon the P. F. Company, and that company made a claim for compensation. In May, 1888, however, another company, the C. Company, gave notice of their interest as lessees by assignment. In August, 1890, the defendant company gave to the C. Company a notice, containing these qualifying words :—"So far as such estate and interest is an estate or interest for which you are entitled to purchase-money or compensation other than such as may be payable under any other notice to treat in respect of the same lands." The question of compensation was afterwards referred to arbitration :—*Held*, that the qualifying words had no effect with respect to restricting the reference to arbitration : *Chilworth Gunpowder Co. v. Manchester Ship Canal* (1891), 8 T. L. R. 79.

(b) Yearly tenants (*see* sect. 17).

(c) Mortgagees, legal and equitable.

Illustrations.

(1) Some property was mortgaged to the plaintiffs, who were not bound to receive their money before a certain date. A railway company, with knowledge of this fact, treated with the mortgagor alone, and, not agreeing, paid into court, to the credit of the mortgagor, the amount of compensation, but made no provision for the compensation to the mortgagees under sect. 114 of the Lands Clauses Act. The company then took possession and commenced pulling down the building. An injunction was granted restraining the company from proceeding until the value of the mortgagees' interests had been ascertained and paid or secured: *Ranken v. East and West India Docks* (1849), 12 Beav. 298.

(2) S. and L. were partners in a business carried on at premises of which S. was the lessee. The title-deeds of this leasehold property had been deposited with M. as security for the balance due from S. before L. became his partner. Disputes having arisen, a receiver was appointed, and the property was ordered to be sold. Shortly afterwards a railway company served notice to treat upon S. and L. with respect to part of the property, and, requiring immediate possession, deposited in the bank, to the account of L. and others, the amount of the valuation of the premises, and gave a bond to S. and L. and also to M., the mortgagee. The company, by arrangement, proceeded to have the amount due as compensation duly assessed, and a sum of 3,500*l.* was awarded as the value of the leaseholds. M. had not been served with any formal notice of these proceedings, but was aware of them. M., however, took no part in the inquiry. The sum awarded was insufficient to pay the debt due to M.; and a suit being instituted by M., the money was transferred to that suit and ordered to stand as security under the Lands Clauses Act:—*Held*, that M. had no lien on the sum in court; but that he was entitled to an account of what was due for principal, interest, and costs, and, in default of payment, to an assignment of the premises comprised in the security: *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501. "They are equitable mortgagees. No proceedings have been duly taken by any person under the statute to deprive them of their rights as equitable mortgagees, and to those rights they are therefore entitled as if nothing had been done. That is the right which I think they retain. . . . Neither have the company any right to complain if, having dealt with that piece of land without having a proper title to it, they are now in such a condition that a slice of their railway may be taken away from them, which would, in other words, be a proceeding in the nature of a distress, compelling them to pay whatever can be lawfully demanded from them": *per* Lord Cranworth, C., at p. 506, *ib.*

*(d) Grantee of an annuity charged on the land.**Illustrations.*

(1) The grantee of an annuity charged upon land, who had received a notice to treat, filed his bill to compel payment of arrears of the annuity and to secure the future payment of it:—*Held*, that the plaintiff could not, upon such pleadings, enforce a specific performance of the notice to treat regarded as a contract to purchase the plaintiff's interest: *Hill v. Great Northern Ry.* (1854), 5 De G. M. & G. 66.

(2) A railway company had powers to take certain property which was subject to the payment of two annuities. The company intended to pass under a corner of the premises by a tunnel, but did not wish to purchase any part of the surface or to interfere with it, and served a notice on the plaintiffs that they were ready to treat for the apportionment of the annuities, and to compensate for the release of the lands specified in the schedule. The defendants' works being within forty yards of the premises, a bill was filed for an injunction restraining the company from commencing or proceeding with any works on or under the premises until the amount payable by the company in respect of the annuities

or such part thereof as might require to be released had been ascertained and paid or secured :—*Held*, that notice ought to be given to everyone who had an interest, and as it was not clear whether the company intended to take the whole or only a part, the injunction must go : *University Life Assurance Society v. Metropolitan Ry.* [1866] W. N. 167.

(e) Person having equitable interest.

Illustration.

The B. Company were in occupation of land under a building agreement, determinable if the buildings were not completed by November 30th, 1885. In 1880 the B. Company learnt that the L. Railway Co. intended to apply for an Act which would interfere with the property. The landowner's agent told the B. Company to stop building until it was seen what became of the railway scheme, but there was no express agreement to extend the B. Company's term. In 1883 the L. Company bought part of the land from the owner, and in 1884 they gave the B. Company notice to treat. The B. Company sent in no claim. In 1886 the L. Company entered on the land without complying with sect. 85 of the Lands Clauses Act. The B. Company brought an action for a declaration that as between the two companies the building agreement was subsisting, and that the compensation for the land ought to be assessed on that basis, and for an injunction restraining the L. Company from taking the land until they had complied with the provisions of the Lands Clauses Act :—*Held*, that when the notice to treat was given the B. Company were entitled as against the L. Company to the benefit of the building agreement, as the agent's direction to stop building created an equity against the owner to prevent his ejecting the B. Company at the end of the term until they had a reasonable time, after notice, to complete the buildings, and that the compensation for the land ought to be assessed on that footing, and that the L. Company were not entitled to enter except under the provisions of the Lands Clauses Act : *Birmingham Land Co. v. London and North-Western Ry.* (1888), 40 Ch. D. 268.

(f) Persons with separate interests are entitled to separate notices and separate assessments of compensation.

Illustrations.

(1) A railway company, under the misapprehension that a tenant for life was owner in fee of certain land, entered into an agreement with his supposed agent under sect. 84 and took possession of the land, on which they constructed their railway. On a bill by the remainderman and mortgagees the Court granted an injunction to restrain the company from retaining possession of the land : *Perks v. Great Wycombe Ry.* (1862), 3 Giff. 662.

(2) A. held a sub-lease of certain premises. He occupied part himself ; part he had sublet to tenants, some of whom had granted sub-leases. The Corporation of L., under the Holborn Valley Improvement Act, 1864, which incorporated the London (City) Improvement Act, 1847, gave a notice to treat directed to "A. and all and every other person having or claiming any estate or interest" in the premises, and a warrant was issued for a jury to assess the claims of A. and those holding under him. A. filed his bill to have his purchase-money and compensation assessed separately :—*Held*, that sects. 20 and 21 of the Act of 1847 gave every person who properly makes a separate claim the right to have a separate jury, a separate assessment, a separate verdict, and a separate payment : *Abrahams v. London Corporation* (1868), L. R. 6 Eq. 625.

(g) Statutory occupiers.

Illustration.

The joint committee established under the London and St. Katharine and East and West India Docks Act, 1888 (51 & 52 Vict. c. cxliii.) were *held* to have such an occupation of the docks of these companies as entitled them to compensation for lands taken by a railway company under its compulsory powers : *London and India Docks v. North London Ry.* (1903), *The Times*, February 6th, 1903.

IV. When notice to treat is unnecessary.

(a) As to yearly tenants, *see* sect. 121.

(b) No notice to treat need be given when the promoters of the undertaking and the owner of the interest in the lands have entered into an agreement to refer the question of compensation for determination by an arbitrator.

Illustration.

The defendant company took possession of lands in the occupation of C. and others without serving any notices to treat or other notices under the Lands Clauses Act. It was alleged that the interest of C. and the others interested was only that of tenants from year to year. Compensation having been claimed, the matter was, by agreement between the parties, referred to an arbitrator for determination. The defendant company refused to pay the sum awarded, and an action to recover it was accordingly brought :—*Held*, that the plaintiffs were entitled to recover ; for a perfect compliance with the statutory forms was unnecessary, where both parties agree upon the course to be taken, and that the notices required by the Lands Clauses Act can only be required when no option is exercised, and it is doubtful what the claimant may require : *Collins v. South Staffordshire Ry.* (1851), 7 Ex. 5.

(c) If there is an agreement between the promoters and the owner enabling the former to take whatever lands they may require at an agreed price, the promoters may take such lands without first giving notice to treat, until the expiration of the period fixed for the completion of the works. If, in such a case, by mistake or misapprehension, they serve notice to treat it will not be effective (*see post*, “Effect of notice to treat on agreement between the parties”).

(d) The right to use a room at stated times, and for a clerk to occupy a desk in it, is merely a licence and not an interest in land, and no notice to treat need be given to the persons entitled to such rights.

Illustration.

Under an agreement directors were entitled to use a board-room for certain purposes at given times, and for a clerk to use a desk in the offices for certain purposes :—*Held*, that there was, in these circumstances, no tenancy : *Municipal Freehold Land Co. v. Metropolitan and District Rys. Joint Committee* (1883), 1 Cab. & E. 184.

(e) Where a landowner has laid out land on a building scheme, but has reserved to himself the right to vary the scheme, a lessee is not

entitled to compensation from promoters who interfere with the scheme.

Illustration.

J., the owner of an estate, prepared a feuing plan showing certain roads. F.'s predecessor in title acquired a lot "together with free ish and entry thereto by the streets laid down on the plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." This reserved power gave J. liberty "to vary and alter the said plan or streets and roads delineated thereon, in so far as regards ground not already feued, in such manner as they shall think fit." The N. Railway Co. took part of the estate under their statutory powers and intercepted a carriage road shown on the plan, which would have given F. access to the northward. F. gave notice of a claim for compensation for injury to his feu to the N. Company, who raised an action to have F. interdicted from raising his claim :—*Held*, that as the road had not been opened the feuar had not acquired the right of ish and entry thereby ; and that there was no obligation on the superior to feu out the whole or any part of the land along the line of the streets shown on the plan and give the feuars access along them : *Fleming v. Newport Ry.* (1883), 8 App. Cas. 265.

V. Second notice or further notice.

(a) If promoters have given an owner a notice to treat which does not exhaust their power of taking his lands, they may give him, within the limits of time prescribed by the Lands Clauses Act, a second or further notice to treat with respect to other lands.

Illustrations.

(1) A railway company, having power to take, amongst other lands, a close belonging to the plaintiff, gave him notice of their intention to take a certain part of it ; and, more than a year afterwards, they gave him notice of their intention to take the remainder. The part first taken was intended for making the railway, and the remainder for making a station, both of which their Act empowered them to make :—*Held*, that the power of the company with regard to the plaintiff's close was not exhausted by the first notice : *Simpson v. Lancaster and Carlisle Ry.* (1847), 15 Sim. 580.

(2) A railway company empowered to take lands for the purposes of the undertaking is not restricted by the Lands Clauses Act to one notice, but may, after a notice for taking certain lands, give a further notice for taking other lands within the prescribed limits, such additional lands being necessary for the works : *Stamps v. Birmingham, Wolverhampton and Stour Valley Ry.* (1848), 7 Hare, 251.

(3) The period within which a railway company was authorised to take lands expired on August 4th, 1848. Long before this date they gave notice to W. to treat, and afterwards delivered to E. (to whom the lands had in the meantime been devised) a bond, and paid the estimated value of the lands comprised in the notice into the bank under the Lands Clauses Act. Under an amending Act, the powers of which extended beyond 1848, the company were authorised to take the land included in the notice ; and on August 3rd, 1848, they gave E. notice, under both Acts, of their intention to take the lands. After August 4th, 1848, but without taking any further steps under the Acts, the company entered upon the lands. On a motion for an injunction, the Court declined to interfere, on the ground that, although the company might not then be entitled to take possession under their compulsory powers, they were able, by some proceeding under the amending

Act, to obtain the land ; and the motion was ordered to stand over, with liberty to E. to bring an action : *Williams v. South Wales Ry.* (1849), 3 De G. & Sm. 354.

(4) In 1848 a landowner gave a company notice for a jury to assess damages which he alleged he had suffered. In 1849 he made a further claim for subsequent damage : and in 1850 gave notice for an arbitrator to assess the whole damages :—*Held*, that this was not irregular, for the first notice had not exhausted all the statutory powers : *Lancashire and Yorkshire Ry. v. Evans* (1851), 15 Beav. 322.

(b) The same rule applies whether the additional land is lateral or vertical, as, for example, strata.

Illustration.

“The next point was this : Having given a notice to take the surface, and having thus severed the ownership, can they buy the mines ? It follows from what I have said that, by the ownership being severed, they would have a power to take the mines unless there is something which prevents their taking them. Now, that something can only be the expiration of the time for purchase. There is no law which says that a railway company within the period fixed may not take first three acres and then three acres more from the same landowners, and if mines are included under the word ‘lands,’ why should there be a different law for taking strata ? I see no reason, and, with great deference to the Vice-Chancellor, I think there is no distinction between the severance of ownership of surface land and mines and severance of ownership laterally by taking three acres out of six from the same landowner” : *per Jessel, M.R.*, in *Errington v. Metropolitan District Ry.* (1882), 19 Ch. D. at p. 570.

VI. Time for giving notice to treat.

This is dealt with under sect. 123, being dependent upon the expiration of the period for compulsory purchase of lands.

VII. Contents, form and service of notice to treat.

(a) No special form is required for a notice to treat. It must, however, state—(1) the particulars of the land required to be taken ; (2) that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works ; and (3) must demand from such parties the particulars of their estate and interest in such lands and of the claims made by them in respect thereof.

Illustrations.

(1) A notice to treat for part of a rope-walk in the line of a railway was accompanied by a diagram or plan of the entire rope-walk, indicating by coloured lines the manner in which the railway would intersect it, and the portion required to be treated for, but having no scale of admeasurement appended to the diagram or plan :—*Held*, that the notice was sufficient : *Sims v. Commercial Ry.* (1838), 1 Rail. Cas. 431.

(2) If a plan delivered by the promoters fails to show the land required and intended to be taken, the promoters may be restrained by injunction from entering upon the land

so omitted : *Kemp v. London and Brighton Ry.* (1839), 1 Rail. Cas. 495. "A plan was submitted to the jury, and on it there are certain portions marked green, accurately, therefore, coming within the description of the notice; and, across the property so coloured, there is a road marked, the colour of which is white. There is no notice to take anything but what is coloured green. Whether there is the admeasured quantity of land which was required seems to be disputed between the parties; but, in the view I take of the case, it is quite immaterial whether the admeasured quantity of land supposed to be or actually contained in the parcels proposed to be purchased did or not include the property under the road. It is quite clear that in the plan which the jury had before them the road is not coloured so as to be included in the purchase. I must, therefore, suppose that, for the purpose of estimating the value of the property, the jury had in view what the company themselves submitted to them, namely, a plan marking the road as a right to be preserved": *per* Lord Cottenham, C., at p. 506, *ib.*

(3) The W. Railway Co., empowered by statute to construct a railway, with all proper works, stations, &c., to terminate by a junction with the L. Railway at a point marked on the Parliamentary plan, gave the plaintiff notice that *the line of railway* would pass through a piece of land which lay beyond the point of junction, but within the line of deviation marked on the plan, and that such land was required for the purposes of the railway, and took the necessary steps under the Lands Clauses Act to require a right of entry thereon. The W. Company, being about to build a station on the piece of land in question, agreed with the L. Company that the station should be used by both companies. The terms of this agreement were afterwards embodied in and confirmed by an Act of Parliament. The station was built, and the W. Company prolonged their line with a double set of rails from the point of junction into the station, one line being for the use of both companies and the other for the use of the W. Company only :—*Held*, that the notice given by the W. Company to the plaintiff was a sufficient notice, although it did not in terms state that the land was required for the purpose of a station; that the prolongation of their line beyond the point of junction with the station was no excess of their powers; and that the arrangement with the L. Company (who had no power to take the land themselves) for the joint use of the station did not vitiate the title which the W. Company had already acquired to the land : *Wood v. Epsom and Leatherhead Ry.* (1860), 8 C. B. N. S. 731. "If in their notice they had said that the land was required for the purpose of a station, the notice would have been unobjectionable. If they had afterwards run a line or a double line of rails into the station it would have been perfectly competent for them to do so. But it is said that the notice is bad because it states that the line of railway will pass through the land, whereas, it is contended, it ought to have stated that the station or the works and conveniences connected therewith would be constructed upon the land. . . . It is said that the owner of the land should have precise notice where it is proposed the line of railway should run. It seems to me that this notice gives him all the information he could reasonably require; the line does pass through his land in the sense in which it is necessary that he should understand that statement. I think there is nothing objectionable in the form of notice": *per* Byles, J., at pp. 758, 759, *ib.*

(4) "Where power is given to a company to take lands without the consent of the proprietor, they are, in the first place, to give him the notice required by the statute of such intention to take, and they are likewise to give notice of their readiness and willingness to treat with the party interested for the value of the land, and, in order to enable them to do so they are, by the 18th section, to demand of the party particulars of his interest. It is plain that is to enable them to treat, on fair grounds, with the proprietor of the land. If the proprietor intends to negotiate with them, and so to avoid the necessity of litigation, he must furnish those particulars, and I think no one can doubt the meaning of the term 'particulars' in the 18th section must be taken to be such particulars as would enable the company to meet the just claim of the party by ascertaining

what is the true value of the land, offering him compensation accordingly": *per* Cockburn, C.J., in *Healey v. Thames Valley Ry.* (1864), 34 L. J. Q. B. at p. 55.

(5) The following was the description of the lands in the notice to treat which became the subject of consideration by Hall, V.-C., in *Dowling v. Pontypool, Caerleon and Newport Ry.* (1874), L. R. 18 Eq. at p. 745: "The lands, of which the particulars are contained in the schedule hereto, with the appurtenances, and which said lands so required are, for the better description thereof, delineated on the plan attached hereto or delivered herewith, and are thereon distinguished by a red colour."

(b) A notice to treat need not be stamped as an agreement.

Illustration.

In an action for specific performance of a contract founded upon an ordinary notice to treat, it was *held* that the notice to treat did not require to be stamped as a contract: *Rawlings v. Metropolitan Ry.* (1868), 37 L. J. Ch. 824.

VIII. Withdrawal, revocation and abandonment of notice to treat.

(a) A valid notice to treat cannot be withdrawn, revoked or abandoned, unless the owner or other person interested consents or unless a counter-notice has been served, even although an offer is made to pay all costs incurred in consequence of the notice.

Illustrations.

(1) Commissioners appointed for improving Market Street, Manchester, gave N. a notice to treat, but took no further steps. N. accordingly applied for a *mandamus* requiring the commissioners to issue their warrant to the sheriff of Lancashire to summon a jury to assess the compensation claimed by N. To this a return was made that during the year after the giving of the notice the commissioners had been obliged by a vote of the ley-payers to make new purchases, whereby great expense would be incurred; and that a great part of the premises for which N. required compensation had been bought by him with full knowledge that they, or part of them, would be required for the purposes of the Act; that a very small portion of the premises was, in fact, requisite for these purposes; and that the commissioners had not, and did not know that they should ever have, funds applicable to the payment of N.'s demands:—*Held*, an insufficient return. In other words, the commissioners could not thus revoke a notice to treat: *R. v. Commissioners for Market Street, Manchester* (1831), 4 B. & Ad. 333, *n.*; 38 R. R. 258, *n.*

(2) The Hungerford Market Co. were by statute empowered to purchase certain premises for the purposes of the Act, and by sect. 6 it was enacted that if any person interested in such premises should, for twenty-one days next after notice given of their being required for the purposes of the Act, refuse to treat or not agree for the sale thereof, in every such case the company should cause the value thereof and the recompense therefor to be determined by a jury, for the summoning and returning whereof they should issue their warrant to the high bailiff of Westminster:—*Held*, that the company, having given such notice to an occupier, could not withdraw from it, although they offered to pay all reasonable costs incurred by him in consequence; but that the Act compelled them, on his demand, to issue their warrant to the high bailiff of Westminster: *R. v. Hungerford Market, Ex parte Davies* (1832), 4 B. & Ad. 327; 38 R. R. 253.

(3) A railway company gave the plaintiff notice that they should require twenty perches of his land. Afterwards they gave him a fresh notice to the effect that they would require only one perch, and also a notice withdrawing the first notice :—*Held*, that the first notice was binding, and could not be withdrawn unless the landowner consented, or unless a counter-notice had been served by the landowner under sect. 92 of the Lands Clauses Act. The defendants were restrained from entering upon the plaintiff's land : *Tawney v. Lynn and Ely Ry.* (1847), 16 L. J. Ch. 282. "The main point to be considered is, whether the company, who had no right to take any portion of the land without complying with the forms of the notice, were authorised to do what they have done. It is obvious that unless the strictest hand is kept, the Acts of Parliament might be turned into instruments of tyranny, and persons might be totally disabled from dealing with their property as their own": *per* Shadwell, V.-C., at p. 282, *ib.*

(4) The Corporation of L. had power, under a special Act, to purchase certain lands, of which the plaintiff was lessee in possession, and the corporation gave him notice to treat for the purchase thereof. Leave was refused to plead that the notice to treat was rescinded by the corporation before anything had been done under it, the plaintiff's interest not being beneficial for the public under the purposes of the Act : *Steele v. Liverpool Corporation* (1866), 7 B. & S. 261.

(5) A railway company gave notice to treat to C. :—*Held*, that they were not entitled to withdraw the notice : *Clark v. City of Glasgow Union Ry.* (1868), 6 Sc. L. R. 185.

(6) "We have been in the habit for many years of holding that where notice to treat for the purchase of lands is given under the Lands Clauses Consolidation Act there follows a legal obligation on the party giving the notice to issue their warrant. It has been so long the practice to treat that as law that I thought at first that the question as to granting a *mandamus* in the present case might turn on the construction of some provision in the Act. But it is not so. . . . When once it is shown clearly as a fact that the owner has got notice to treat binding him, there arises, I take it, by operation of law, a duty on the party giving notice to go on and determine the amount to be paid by way of compensation. . . . Mr. Keane urged that the defendants were a public body, and as such, on the authority of *R. v. Commissioners of Woods and Forests* (1850), 15 Q. B. 761, were not bound by their notice, and that no *mandamus* would lie against them. But it is obvious that the case of the Marylebone Vestry is quite different from that of the Commissioners of Woods and Forests. The vestry does not represent Her Majesty in any point of view": *per* Blackburn, J., in *Birch v. St. Marylebone Vestry* (1869), 20 L. T. at p. 701.

(7) Statutory trustees gave notice of their intention to purchase and take property held by A. on lease, and afterwards withdrew the notice. They never took possession. A. insisted that the amount of compensation should be assessed by arbiters under the Lands Clauses Act:—*Held*, that the statutory notice to take the property constituted a valid and binding contract from which the defenders could not resile without the pursuer's consent : *Lockerby v. City of Glasgow Improvement Trustees* (1872), 10 Ct. Sess. Cas. (3rd series) 971; and see *Coats v. Caledonian Ry.*, p. 120, *supra*.

NOTE.—The rule that promoters cannot, except under the circumstances above mentioned, withdraw a notice to treat does not apply to a Government department, at all events if there are provisions in the Act under which the notice was given which only enable the department to proceed with the undertaking if the cost does not exceed a certain amount and it appears that that sum would be exceeded.

Illustration to Note.

The Commissioners of Woods and Forests gave notices under 9 & 10 Vict. c. 38—an Act to empower them to form Battersea Park—that they intended to take certain scheduled

lands. One of the landowners obtained a *mandamus* to the Commissioners to cause a jury to be summoned to assess compensation for his land. On return showing that the Commissioners in pursuance of the Act and on behalf of the Crown gave the notices to ascertain whether the lands could be purchased for the sum limited by sect. 1 (which, by the claims sent in, it appeared they could not):—*Held*, that the Commissioners under the statute were acting in a public capacity, and that the notice given to them did not constitute a *quasi-contract* enforceable by *mandamus*: *Reg. v. Commissioners of Woods* (1850), 15 Q. B. 761.

(b) Where a notice to treat given in time is not proceeded with and the time, either original or extended, limited for completing the works expires without any steps having been taken by the owner to compel the company to proceed under it to assess the compensation to be paid, the notice would, it seems, be treated as abandoned and of no effect.

Illustrations.

(1) A railway Act passed in July, 1864, limited three years as the period for taking lands and five years for completing the works. The company obtained a magistrate's certificate that the whole of the required capital had been subscribed, and served a notice to take certain lands of the Y. Iron Co. In 1869 the company, having failed to raise sufficient capital to make the line, obtained an Act (of which the Y. Company had notice) for amalgamating their company with the N. Company, who were to make the railway, and the time for completion was extended to July, 1872. In 1871 the N. Company took possession of the land under their notice. The Y. Company filed a bill for an injunction to restrain the N. Company from taking the land, alleging (*inter alia*) that the notice to treat, if valid, had been abandoned by lapse of time:—*Held* that, in the circumstances, no such lapse of time had occurred as amounted to abandonment of the notice: *Istalyfera Iron Co. v. Neath and Brecon Ry.* (1873), L. R. 17 Eq. 142.

(2) A railway company was allowed, by their special Act, three years for the exercise of their compulsory powers, and five years for the construction of the railway; after the end of the latter period the powers for making and completing the railway to cease, save as to so much as was then completed. The company served the respondent with notice to treat as to certain lands a few days before the expiration of the three years. Negotiations took place, and thirteen days before the expiration of the five years the company (having complied with the requirements of sect. 85 of this Act, 1845) took possession:—*Held*, that the entry was lawful, and that it could not be restrained by injunction: *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480; discussed in *Charleston v. Rolleston* (1884), 28 Ch. D. 237. "There have been cases in which a railway company has given a notice to a landowner to treat for the purchase of land, and no further step has then been taken either by the company or the landowner, and the extended period for completing the works has expired, and the question has been raised, Could the company in that state of things proceed with its notice to treat and assess the compensation under the Lands Clauses Act? Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond v. The North London Ry.* (1868), L. R. 3 Ch. 679, that, if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase, and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out. There is no *rei interveniens*, no change of the *status quo ante*, nothing which requires to be undone. The whole matter has been a project merely; and, as a project, it has come to an end": *per* Lord Cairns at p. 489, *ib.*

(c) Effect of counter-notice (*see* sect. 92).

IX. Validity of notice to treat : Estoppel : Laches.

(a) Promoters may be estopped from setting up a notice to treat when they have stood by and not set it up, or have so acted as to justify the owner in believing that they have abandoned it.

Illustrations.

(1) The trustees of S. Harbour offered money for certain land. The owner declined it, but desired that the amount might be settled by a jury, and agreed to allow them to take possession if they paid interest on the amount of the compensation to be assessed. The inquiry was held and compensation assessed :—*Held*, that the absence of any preliminary requisite to the taking of the inquisition (as, twenty-one days' notice to treat) could not then be set up by the trustees, whose duty it had been to proceed : *R. v. Swansea Harbour Trustees* (1839), 8 A. & E. 439.

(2) Notice to take part of certain property was given by a company ten days before the expiration of their compulsory powers. A counter-notice was given by the owner requiring them to take the whole. Nothing was done until fourteen months later, when the company gave notice of an intended application to Parliament to abandon the undertaking. This was not obtained, and nineteen months after the first notice the company gave notice to issue their warrant for a jury to assess compensation :—*Held*, that the owner was entitled to an injunction restraining this proceeding, as the owner had been led to believe the undertaking had been abandoned : *Hedgcs v. Metropolitan Ry.* (1860), 28 Beav. 109.

(3) S.'s predecessor in title owned a small part of a meadow, of which C. owned a large part, and other persons also owned part. After negotiations the G. W. Railway Co. took the whole meadow and paid compensation to C. and accepted a conveyance from him which excepted S.'s part. S. brought an action of ejectment. The company said that their possession was taken without the consent of S.'s predecessor, and on the settling of a special case S.'s boundaries were for the first time ascertained. S. recovered judgment in ejectment and stretched a rope across the railway which was severed by the G. W. Company's trains. S. filed two bills, the first for an injunction to restrain interference with his land, and the second to restrain the company from proceeding to summon a jury on a notice to treat served fourteen years before on his predecessor :—*Held* that, under the circumstances, the company were not entitled to proceed under the notice to treat, and that, under the circumstances, there had been no mistake or inadvertence so as to bring the case under sect. 124 of the Lands Clauses Act : *Stretton v. Great Western and Brentford Ry.* (1870), L. R. 5 Ch. 751.

(4) The plaintiff claimed against the defendants as mortgagee in possession of the property alleged to have been injuriously affected by the operations of the defendants acting under their statutory powers. Both parties selected an arbitrator, and an award was duly made. It was afterwards found that the plaintiff was not the mortgagee in possession, but had only a reversionary interest in the premises :—*Held*, that the defendants, by proceeding to arbitration, had waived any objection which they might have made to the claim, and that the misdescription of the plaintiff's interest did not go to the root of her right to sue upon the award : *Lovering v. City of London and Southwark Subway* (1891), 7 T. L. R. 600.

(b) Similarly, an owner may be estopped from disputing the validity or legality of a notice to treat if he has agreed to waive the notice ; or if

he has so acted as to justify the promoters in believing that he did not intend afterwards to inquire into the legal validity of the acts which they were doing; or if he has stood by and not raised the question.

Illustrations.

(1) A subsequent treating with a railway company will be considered by the Court to be a waiver of any objection to the proceedings, the subject of the negotiations, although such proceedings were not in part within the statutory powers: *per* Wigram, V.-C., in *Tower v. Eastern Counties Ry.* (1843), 3 Rail. Cas. 374.

(2) A company gave a landowner notice to treat, and entered on the land under sect. 85. The purchase-money was not assessed and no conveyance was executed. The three-years' period having expired, it was *held* that the landowner might still have the purchase-money assessed, but that he could not re-enter upon the land: *Doe d. Armistead v. North Staffordshire Ry.* (1851), 16 Q. B. 526.

(3) A company was authorised by Act to make a public canal through lands of which A. was the owner and B. the lessee, and upon payment of compensation the land was to vest in the company. An arrangement was made as to the land by the company with B., but not with A. The canal was made "with the full consent and approbation of and in accordance with the wishes of A.," whose name was mentioned in the Act, and it was enjoyed until the expiration of the lease in 1844. The representatives of A. then recovered at law the land taken for the canal:—*Held*, that A., having thus sanctioned the formation of the canal, was not entitled to retake possession, but only to a fair compensation to be determined by the agricultural value of the land taken as calculated in 1844, and not in 1794: *Beaufort (Duke) v. Patrick* (1853), 17 Beav. 60.

(4) Where an Act of Parliament authorised the construction of a railway over land belonging to W. upon the payment of compensation, and the railway was made without W.'s authority, but was afterwards used for fifteen years with W.'s knowledge, but without any action on his part:—*Held*, that he could not interfere with the possession, but was entitled only to have compensation assessed and paid: *Mold v. Wheatecroft* (1859), 27 Beav. 510.

(5) H. entered into a contract with G. and L. for the purchase of certain land near Manchester. Upon the land being required by a railway company, G. and L. left the negotiations in the hands of H., and gave no notice to the railway company until the value of the land taken had been assessed by a jury and the company had constructed the railway upon the land:—*Held*, that G. and L., who, after the purchase-money had been paid into court, claimed to be owners in fee, alleging that the contract with H. was rescinded, could not be allowed to take further proceedings for fixing the value of the land, and must be restrained by injunction from further proceedings with respect thereto: *Lancashire and Yorkshire Ry. v. Higgins* [1877] W. N. 49.

(6) "It is perfectly certain that a man may so conduct himself that even if he has undoubted rights, he may be precluded by his conduct from insisting upon them. If the commissioners originally had no power to take this property, I do not say that there might not be such conduct on the part of the plaintiff as would prevent him from afterwards coming to ask the Court to interfere for his protection. He might so act as to lead the commissioners into a trap by something which would justify them in believing that he did not intend afterwards to inquire into the legal validity of the acts which they were doing": *per* Cotton, L.J., in *Lynch v. Sewers Commissioners* (1886), 32 Ch. D. at p. 91.

X. Remedy for non-compliance with the Act.

Where the company take land which they are not entitled to take, or where they do not comply with the provisions of their special Act, they will be restrained from proceeding with the execution of their works, unless the landowner has so acted as to disentitle him from obtaining this remedy or unless damages are an adequate remedy. The Court will not, however, grant an injunction upon an interlocutory application unless the case is clear.

Illustrations.

(1) There is no equity to restrain by injunction the owners of a railway constructed over the land of an owner from using the railway after completion or from interrupting the landowner's workmen in removing it and restoring the land to its original state, although the possession of the land for the purpose of constructing the railway may have been obtained in a wrongful manner from the owner's tenant: *Deere v. Guest* (1836), 1 Myl. & Cr. 516; but see *Perks v. Wycombe Ry.* (1862), 7 L. T. at p. 153, and *Goodson v. Richardson* (1874), L. R. 9 Ch. 221, where *Deere v. Guest* was commented on and explained as being merely an action of ejectment brought in the Court of Chancery without any equitable circumstances to induce that Court to assume jurisdiction.

(2) A railway company purporting to act under and within their statutory powers purchased a subsisting lease in lands and gave notice to M., the owner of the reversion in fee, that they would summon a jury to assess the value of the fee simple. M. filed his bill, insisting that the company were not empowered to take more than a certain part of the land, and asking for an injunction to restrain them from proceeding to assess the value of the excess beyond that portion:—*Held*, that inasmuch as the contemplated proceedings would, if the company were not authorised by the Act to take the land in question, be a nullity, and inasmuch as the entry and possession of the company as derivative lessees were lawful and no case was made out of any sudden serious injury done to the inheritance, the motion for an injunction must be refused, with costs: *Mouchet v. Great Western Ry.* (1838), 1 Rail. Cas. 567.

(3) Under a special Act a railway was made to pass in front of a wharf belonging to B., separating the frontage thereof from the water; but the company had made a jetty or communication leading from the water to the wharf. B. obtained an injunction restraining the company from prosecuting any works which would render the plaintiff's wharf inconvenient for its purposes, until they had made another good and sufficient wharf as convenient as the old wharf or as near thereto as might be:—*Held*, upon motion to dissolve the injunction, that the injunction should be continued until after the trial of an action at law on the question whether B. was entitled to have such a wharf as he claimed: *Bell v. Hull and Selby Ry.* (1840), 1 Rail. Cas. 616.

(4) After a railway company had purchased a piece of land from A., who was mentioned in the book of reference as the owner of it, B., a neighbouring owner, part of whose land the company had also taken, claimed to be the owner of the piece of land and filed a bill for an injunction to restrain the company from continuing in possession of it and from committing waste upon it. The Court refused the injunction, the evidence being vague: *Webster v. South-Eastern Ry.* (1851), 1 Sim. (N.S.) 272.

(5) Land not within a notice to treat had been taken possession of by a public company who had erected some works on it. The plaintiffs, who claimed the land, had between the filing of the bill and the hearing pulled down part of the company's works:—

Held, that the proper mode of trying the right was by action of ejectment ; and the plaintiffs, having taken the law into their own hands and not having applied for an injunction before the hearing, were not then entitled to it : *Lind v. Isle of Wight Ferry* (1862), 1 N. R. 13.

(6) Where the validity of an act is a matter of dispute between the parties to an action, and the plaintiff can be adequately indemnified in damages, the Court will not grant an interlocutory injunction to restrain the defendants from committing the act, when the defendants might be wronged thereby, and that where specific performance of a contract cannot be decreed the Court will not interfere by way of injunction : *Munro v. Wivenhoe and Brightlingsea Ry.* (1865), 13 W. R. 880.

(7) Where it was open to the plaintiff to obtain, at the hearing, compensation in damages, and the contract was one of which specific performance could not be directed as against the plaintiff, the Court refused to grant, upon interlocutory application, an injunction restraining the defendants from interfering with the plaintiff in carrying out certain works : *Garrett v. Banstead and Epsom Downs Ry.* (1865), 13 W. R. 878.

(8) A lessee of land taken by a railway company, without notice to treat, filed a bill against the company for an injunction to restrain them from taking more land, and for assessment of damages, eight months after the company had entered upon the land. Pending the proceedings the company disclaimed any intention to take more land, and the plaintiff did not, therefore, ask for an injunction :—*Held*, that inasmuch as the plaintiff's right to an injunction and damages was clear at the time of the filing of the bill, he was entitled, at the hearing, to an inquiry as to damages, and a direction that the company should pay the sum assessed, with costs : *McRae v. London, Brighton and South Coast Ry.* (1868), 18 L. T. 226.

(9) Commissioners were empowered to take water from a stream to supply a town and district. Certain works were prescribed for preserving a sufficient supply of water for the mill-owners affected. The commissioners did not comply with their Act in executing the reserve reservoir. On an application by the mill-owners the commissioners were restrained from taking, collecting, impounding, &c., the waters of the stream by the works constructed by them or by any works other than the works described and authorised by their Acts : *Herron v. Rathmines Improvement Commissioners*, [1892] A. C. 498.

XI. Effect of the notice to treat.

(a) The giving of a notice to treat does not constitute an agreement for sale : it only enables the person receiving it to insist that the course prescribed in the Act shall be followed to its conclusion.

Illustrations.

(1) "The moment the company have given the notice the relative situation of vendors and purchasers is constituted between the parties, and the value of the property (if the parties cannot agree) is to be ascertained by reference to a jury, to be summoned from the county or district within which the property is situate" : *per* Lord Cottenham, C., in *Stone v. Commercial Ry.* (1839), 4 Myl. & Cr. at p. 124 ; 48 R. R. 32.

(2) Notice to treat constitutes the relation of vendor and purchaser : *Edinburgh, Perth and Dundee Ry. v. Leven* (1852), 1 Macq. H. L. 284.

(3) A company having, by virtue of statutory powers, given notice to treat, and the price being afterwards fixed, the contract is complete, and the Court will entertain a suit

by the company for specific performance, but they will not, although successful, obtain their costs if they could have derived the same advantage by proceeding under their Act : *per Romilly, M.R., in Regent's Canal v. Ware* (1857), 23 Beav. 575.

(4) "I consider that a notice to treat constitutes the relation of vendor and purchaser to a certain extent and for certain purposes, that some of the consequences flowing from an actual contract might also flow from a notice to treat. The particular lands are fixed—neither party can get rid of the obligation, the one to take, the other to give up ; and such is the meaning to be attributed to those expressions which have dropped from different judges as to its being a contract, but to no further extent is it a contract on the part of the landowner ; but if the company and the landowner after the notice come to an agreement, that is an enforceable contract": *per Kindersley, V.-C., in Haynes v. Haynes* (1861), 30 L. J. Ch. at p. 581.

(5) A railway company gave M. notice to treat for certain of her lands, and required particulars of her interest. No agreement was come to, and the company paid the estimated value of the land required into court, and took possession under sect. 85 of the Lands Clauses Acts. M. afterwards elected to have the amount of purchase-money and compensation ascertained by arbitration, and an award was duly made. M., however, failed to obtain a completion of the purchase by the company, and therefore filed her bill for specific performance :—*Held*, by Wood, V.-C., that a Parliamentary contract had been made which the Court would enforce at the instance of either party : *Mason v. Stokes Bay Ry.* (1862), 32 L. J. Ch. 110.

(6) "Then comes the question whether this notice is obligatory upon them at all. Now, ever since the decision of the Court of Queen's (*sic*) Bench, in the case of *The King v. The Hungerford Market Co.* [4 B. & Ad. 327 ; 38 R. R. 253 ; *ante*, p. 146] it has been held that where a railway company, or any other public joint-stock company, are entitled under the compulsory powers contained in their Act to purchase and take possession of premises, if they give a notice of their intention to take those premises they agree to take them, and the notice, in fact, operates as a contract between them and the owners or occupiers of the premises—an undertaking from them to the owner or occupier of the premises to become the purchaser of the premises in question. That case, which was decided as long ago as the year 1832, has never yet been questioned": *per Kelly, C.B., in Morgan v. Metropolitan Ry.* (1861), 38 L. J. C. P. 87.

(7) "There was, indeed, a notion once prevalent that a company, by giving notice to treat, committed themselves in such a manner that a Court of equity would hold that to be an agreement upon their part from which they could not recede, and which could be enforced by the Court before the transaction had gone any further. That notion was, however, found to be erroneous ; and it was decided by Lord Cottenham in *Adams v. Blackwall Ry.* (1850), 2 Mac. & G. 118, that the giving notice would only authorise the person who received it to insist that the course pointed out by the Act should be taken, and that a *mandamus* would issue compelling the company to summon a jury or proceed to arbitration for ascertainment of the price. But the case is different when the price is ascertained, for you have then all the elements of a complete agreement, and, in truth, it becomes a bargain made under legislative enactment between the railway company and those over whom they were authorised to exercise their power": *per Lord Hatherley in Harding v. Metropolitan Ry.* (1872), L. R. 7 Ch. at p. 158.

(8) Although notice to treat, followed by the assessment of purchase and compensation money, does (not, *sic*) create the relation of vendor and purchaser so as to subject the parties to the ordinary rules relating to specific performance, yet the owner (vendor) may so act as by his conduct to lose the right to claim the aid of the Court to compel specific performance by the party purchasing under statutory powers : *Burr v. Wimbledon Local Board* [1887] W. N. 155.

(b) The giving of a notice to treat is not necessarily a putting in force of compulsory powers (see *ante*, p. 109).

Illustrations.

(1) A railway company gave notice to treat as to certain lands of the plaintiff. The whole of the capital had not been subscribed. The parties failing to agree as to price, the plaintiff required the company to have the compensation assessed as directed in the Act, and applied for a *mandamus*:—*Held*, that the company could not plead that their own notice was invalid, owing to the provisions of sect. 16. A notice to treat is not necessarily a putting in force of any of the powers in relation to the compulsory taking of land; at any rate, where the owner agrees to sell, and the only dispute is as to price: *Guest v. Poole and Bournemouth Ry.* (1870), L. R. 5 C. P. 553; approved in *In re Uxbridge and Rickmansworth Ry. Acts*, 43 Ch. D. 436 (*infra*); and see *ante*, p. 109.

(2) The P. Railway Co. gave the plaintiff notice to treat for about six acres of his land required for their railway. The company had served the plaintiff with notice under sect. 85 of the Lands Clauses Act of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the plaintiff's interest in the land comprised in the notice to treat, including compensation for injury. The company afterwards paid 2,000*l.* into court and executed a bond for 2,000*l.*, as provided by sect. 85. The company's contractors then entered on the land and began operations:—*Held*, that neither the giving a notice to treat nor taking steps to have the purchase-money and compensation ascertained, nor the entry under sect. 85, was an exercise of a compulsory power of purchase within the meaning of sect. 16 of the Lands Clauses Act: *Ford v. Plymouth, Devonport and South-Western Junction Ry.* [1887] W. N. 201.

(3) The mere service of a notice to treat, even if followed by a contract, is not an exercise of compulsory powers entitling the landowner to priority over creditors in the event of the company becoming insolvent; and even if giving notice to treat did amount to an exercise of compulsory powers, expenses incurred by the landowner to his solicitor and surveyor in consequence of the notice, whether followed or not by a subsequent abortive agreement for purchase, does not constitute loss or damage within the meaning of the Uxbridge and Rickmansworth Railway Act, 1881 (incorporating the Lands Clauses Act), s. 34, or the Uxbridge and Rickmansworth Railway (Abandonment) Act, 1888: *In re Uxbridge and Rickmansworth Ry.* (1890), 43 Ch. D. 536. "The only thing they rely upon is really service of notice to treat, because nothing was done in exercise of the compulsory powers—if there was an exercise of the compulsory powers by the railway company—beyond notice to treat. In my opinion, it cannot be said that mere notice to treat is an exercise of the compulsory powers. . . . Then, has there been an exercise of the compulsory powers? In my opinion there has not. It is very true the power to give notice to treat is included in that group of sections in the Lands Clauses Act headed 'And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows.' Then there follows a direction that the promoters of the undertaking shall give a notice to treat in respect of the lands they required to take. But, although the direction to give notice to treat is included within that group of clauses, there may never be any step taken as regards the exercise of compulsory powers, because, if the company have not got their capital subscribed, they cannot exercise any compulsory powers, and the notice to treat, as was the case in one instance here, may be merely a step taken towards an agreement with the landowner in order to ascertain whether he is willing to make the contract with the company": *per* Cotton, L.J., at p. 562, *ib.*

(c) If promoters take land without having given notice to treat and rely upon court a deposit as security for the purchase-money, there is no

relation of vendor and purchaser, and they cannot call upon the landowner to produce his title for investigation.

Illustration.

When a railway company, without giving a landowner any notice to treat, takes his land under statutory powers, and makes no subsequent agreement with him, but pays into court a deposit as security for duly ascertained compensation-money, the parties are not upon the footing of vendor and purchaser, and the company cannot call upon the landowner to produce his title for their investigation : *Martin v. London, Chatham and Dover Ry.* (1868), 17 L. T. 487.

NOTE.—See sect. 123, *post*.

(d) If, after notice to treat, a company by its agents agrees to purchase the land, the agreement is binding, although not under the common seal of the company, whereas without a notice to treat a company would not be bound by such an agreement.

Illustrations.

(1) A railway company served a notice to treat for the purchase of lands, and certain persons in their employ who either were or acted as if they were authorised to arrange the price obtained the vendor's signature to a printed form of agreement fixing the amount :—*Held*, that the company were bound to perform the contract, although it did not bear their common seal : *Smith v. Dublin and Bray Ry.* (1853), 3 Ir. Ch. R. 225. “I apprehend it must be concluded from all the cases that it is not necessary that the seal of the company should be affixed to an agreement for purchase made after the service of the notice to treat. That is to be inferred from *Walker v. Eastern Counties Ry.* (1848), 6 Hare, 594, and *Adams v. London and Blackwall Ry.* (1850), 2 Mac. & G. 118. It is true that a corporation cannot in general contract otherwise than under seal, but it may be authorised to do so by the object, scope or terms of the Act of Parliament under which it is incorporated. . . . In the case before me, the notice to treat is not under the company's seal, and it has not been argued that it ought to be. Then why should the agreement that was consequent upon it ?” : *per* Blackburne, C., at p. 230, *ib*.

(2) Upon being served with a notice to treat by a railway company W. sent in particulars of his claim, demanding a fixed sum, and shortly afterwards served the company with notice under sect. 68 of the Lands Clauses Act. The company having for twenty-one days failed to summon a jury, W. brought an action for the sum claimed, upon which the company's solicitor wrote to W.'s solicitor to the effect that the company would pay the amount claimed for W.'s interest in the land. W., having failed in the action, filed his bill for specific performance of the agreement :—*Held*, that the notice and claim and the letter together amounted to a binding agreement : *Inge v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 1 Sm. & G. 347.

(e) Notice to treat, followed by determination of the price by surveyors (verbally appointed) and verbal acceptance of the price named, is, notwithstanding the Statute of Frauds, a valid contract.

Illustration.

W., by his will in 1859, bequeathed leaseholds to A., and in 1865 was served with a notice by a railway company to treat for the purchase, under their Acts, of the leaseholds for the

purposes of their undertaking. Surveyors appointed by W. and the company, but not in writing, settled the value of the leaseholds, and the former verbally agreed to accept the sum named. W. died in February, 1869. The matter remained in abeyance until April, 1870, when the sale was completed by the executor :—*Held*, that the notice to treat, followed by the valuation of the surveyors, was, notwithstanding the Statute of Frauds, a valid contract : *Watts v. Watts* (1873), L. R. 17 Eq. 217.

(f) The notice to treat is valid and effective until the expiration of the period limited for the execution of the works (*see* sect. 123, *post*).

(g) After notice to treat the owner cannot lawfully deal with his interest or with the property ; and an interest created or enlarged by him after notice to treat has been given him is not the subject of compensation under the Lands Clauses Act.

Illustrations.

(1) Where, by an Act of Parliament, a corporation was empowered to purchase subsisting interests in certain hereditaments, and it was directed that the purchase-money should be reinvested in land, and in the meantime be laid out in the Funds and the dividends paid to the persons entitled to the rents :—*Held*, that neither persons who had taken leases, *after the passing of the Act*, nor the lessors, in respect of their right to renew, were entitled to any compensation out of the purchase-money : *In re Bishop of London* (1818), 1 Sim. & S. 268.

NOTE.—This case was really a decision of the recorder, and came up to the Court of Chancery on the question of costs of reinvestment.

(2) A landlord entered into some arrangement with his tenant for a lease for eight years. Afterwards a railway company, being in want of part of the farm, agreed to purchase it from the landlord. Afterwards, by some mistake, the landlord, on the same day, granted a lease of the whole farm to the tenant, and conveyed a part of it to the company. A question also arose, under the agreement, whether the landlord or the company was to make compensation to the tenant. The company took possession, and the tenant brought ejectment :—*Held*, in these circumstances, that the company could maintain a suit to stay the ejectment and ascertain the rights, and an inquiry was directed : *Norwich Ry. v. Wodehouse* (1849), 11 Beav. 382.

(3) A railway company gave notice to a tenant at will to take part of the lands, and they were allowed to take possession and complete the line. Afterwards, a person who had, at a date later than that of the notice, purchased one-ninth of the land, filed a bill praying an injunction to restrain the railway company from entering upon, continuing in possession of, or otherwise interfering with the land. The bill was dismissed with costs : *Carnochan v. Norwich and Spalding Ry.* (1858), 26 Beav. 169.

(4) Notice to treat was given to a landowner by a railway company :—*Held*, that this so far constituted a contract that the owner could not afterwards put up the property for sale : *Metropolitan Ry. v. Woodhouse* (1865), 13 W. R. 516.

(5) On January 29th, 1869, M. & Co., the lessees of certain lands in respect of which notice to treat had been given to them in 1868, received notice, both from the railway company by whom the notice to treat had been given and from the lessors, to leave at the expiry of the ensuing term, which was at Whitsunday, 1869. Afterwards, on February 4th, 1869, they obtained a further lease for three years from Whitsunday, 1868, and gave notice to

the railway company that they were lessees of the lands for more than a year, and claimed compensation accordingly :—*Held*, that M. & Co. were not entitled to compensation, the lease of February, 1869, being granted after the date of the notice to treat, and an injunction was granted against their continuing in possession : *City of Glasgow Ry. v. McEwen* (1870), 8 Ct. Sess. Cas. (3rd series) 747.

(6) A notice to treat was served on a lessee of a house for a term of years who had sublet part of the house to a weekly tenant. After receiving the notice to treat the lessee agreed with the weekly tenant to grant him a lease of the rooms occupied by him for a term of three years. It was *held* that compensation could not be claimed under this agreement, as the lessee's power of dealing with the property was concluded by the notice to treat : *Ex parte Edwards, In re Marylebone (Stingo Lane) Improvement Act* (1871), L. R. 12 Eq. 389. "I am of opinion that the owner's power of dealing with his property is concluded when the notice to treat is served, and that a lease granted subsequently to that period to a tenant cannot properly be compensated for" : *per* Lord Romilly, M.R., at p. 321, *ib*.

(7) The M. Board of Works gave notice to treat for the purchase of certain houses. After notice the owner granted leases for three years to his weekly tenants. The tenants sent in their claims for compensation, which, after some litigation, failed. Afterwards the owner petitioned for payment of his purchase-money, which had been paid into court under the Lands Clauses Act, when the Board claimed to be reimbursed for the costs they had incurred in adjusting the claims of the tenants :—*Held*, that there was no power under the Act to make the order asked for, but that as the Board had been put to unnecessary expense by the petitioner's conduct, the Court would go as far as it could and refuse him his costs of the petition : *Ex parte Topple* (1871), 25 L. T. 407.

(8) The N. Railway Co. served notice to treat upon W.'s agents at 1 o'clock on the day upon which W. signed a lease of the farm (already executed by the tenant) with entry at the ensuing term. There was no evidence as to the hour at which the owner signed the lease :—*Held*, that the tenant could not sustain a claim for loss of profits, he having failed to prove a completed contract of lease between the owner and himself at the hour when the notice to treat was served, and that it was therefore unnecessary to determine whether possession under the lease was necessary to entitle the tenant to compensation : *North British Ry. v. Lindsay* (1875), 3 Ct. Sess. Cas. (4th series) 168.

(9) H. entered into a contract with G. and L. for the purchase of certain land, and, upon the land being required by a railway company, G. and L. left the negotiations in the hands of H., and gave no notice to the railway company until the value of the land had been assessed by a jury and the company had paid into court and constructed their line over it :—*Held*, that G. and L. could not be allowed to take further proceedings for fixing the value of the land, and must be restrained by injunction from further proceedings with respect thereto : *Lancashire and Yorkshire Ry. v. Higgins* [1877] W. N. 49.

(10) S. agreed to sell twenty-three acres of land held under a lease for years to a railway company for the purposes of their undertaking. The company afterwards obtained the necessary statutory powers, and gave S. notice to treat for thirteen out of the twenty-three, the smaller quantity being all that was then required. S. thereupon applied for an injunction to restrain the company from proceeding under the notice, on the ground that they were bound to take the twenty-three acres :—*Held*, that the company had acquired the land under an agreement, not under their Act, from one who was entitled to sell, and that they were entitled to take what land they from time to time might require, and were not bound to take the whole at once : *Stenson v. North British Ry.* (1901), 4 Ct. Sess. Cas. (5th series) 224.

(11) A railway company served notice to treat upon H., chiefly for the purpose of preventing H. from building on his land and thus increasing the value. H. afterwards sold

the property, with notice of the notice to treat :—*Held*, that H. had power to sell, although he had no power to create a new interest in the land : *Sewell v. Harrow and Uxbridge Ry.* (1902), 19 T. L. R. 130. This case was taken to the Court of Appeal, but was settled, no opinion being expressed on the point decided by the Court of first instance (*see* 20 T. L. R. 21).

(12) The principle that an interest in land created after notice has been given to treat for that land is not the proper subject of compensation under the Lands Clauses Act applies also to adjacent lands belonging to the same owner which have been injuriously affected by the execution of the authorised works. No interest of an onerous nature can be created by an owner after notice to treat either in the land to be taken or in land injuriously affected : *Mercer v. Liverpool, St. Helen's and South Lancashire Ry.*, [1904] A. C. 461.

(13) “It was held by the Court of Appeal and the House of Lords in the case of *Mercer v. Liverpool, &c., Ry.*, [1904] A. C. 461, that the proprietor could not disregard the obligations imposed upon him by the notice to treat in respect of land which might be injuriously affected any more than in respect of land required to be taken. . . . The landowner, however, is only precluded from dealing with his property in such a way as to subject the company which has given the notice to a greater burden in respect of compensation for damage occasioned by their works. So long as he does not infringe this rule he may, as it seems to us, sell and convey his land to a purchaser; and the company cannot take advantage of such a conveyance to escape from any obligation on their part subsisting at the time of the conveyance in respect of the lands conveyed”: *per* Stirling, L.J., in *Dawson v. Great Northern and City Ry.* (1904), 21 T. L. R. at p. 115.

(h) If a person is informed that his premises will probably be required by a local authority, and notwithstanding completes repairs which he has commenced, he is entitled to compensation in respect of them.

Illustration.

The owner of certain houses which were out of repair, while carrying out repairs, was informed that they would in all probability be required by the public authority. The owner refused to stop the repairs, and afterwards 556*l.* were awarded him as compensation. This award he traversed. At the hearing the judge told the jury that if they considered the owner's outlay not to have been *bonâ fide* but for the purpose of inflating his claim, they should disallow it:—*Held*, that this direction was wrong, and that appellant's outlay should have been allowed : *Higgins v. Dublin Corporation* (1891), 28 L. R. Ir. 484.

(k) A mere notice to treat—upon which nothing has been done—does not constitute “a debt owing or accruing” which can be attached under the Rules of the Supreme Court.

Illustration.

The Metropolitan Board of Works gave notice to treat for E.'s interest in certain premises. Afterwards the plaintiff obtained judgment against E., and then sought to attach the sum that might be payable by the Board of Works to E. in respect of his premises :—*Held*, that there was no debt either owing or accruing to E. from the Board of Works which could be attached; there was merely a surmise that a debt might become due : *Richardson v. Elmit* (1876), 2 C. P. D. 9.

(l) Effect on agreements between the parties.

(i.) An agreement is not waived merely by notice to treat.

Illustration.

A landowner agreed with a railway company to sell them ten acres of land and one acre for a station at a certain price, and that if the company should require more land for the station or for any purpose, they should pay therefor at the rate of 100*l.* an acre, and the agreement was to be supplemental to the Lands Clauses Act. The ten acres were paid for and conveyed. Before the compulsory powers of the company expired, they (seemingly by mistake) gave notice to treat for three more acres, and before the time for completion had expired they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:—*Held* that, under the agreement, the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station or for slips of earth at 100*l.* an acre: *Kemp v. South-Eastern Ry.* (1872), L. R. 7 Ch. 364.

(ii.) But if the notice to treat is followed by entry under sect. 85 the agreement is waived.

Illustration.

Before the formation of a company the defendant and other landowners, being desirous of obtaining certain railway communication, signed an agreement with a person acting for the promoters, but described as the agent of the company, that if an Act was obtained in either of the two next sessions they would sell such land as might be required for the railway at thirty years' purchase. The company obtained their Act, and, before claiming the benefit of the agreement, served upon the defendant a notice to treat and did not formally insist upon the agreement until the defendant had appointed an arbitrator. The company afterwards entered under sect. 85 of the Lands Clauses Act:—*Held*, that sect. 85 applied only to compulsory purchase; that the proceedings of the company assumed the non-existence of any agreement; hence, a bill by the company and two promoters for specific performance of the agreement was refused: *Bedford and Cambridge Ry. v. Stanley* (1862), 2 J. & H. 746.

(m) All proceedings subsequent to the notice, including assessment of compensation, must be relative to the whole property included in the notice.

Illustrations.

(1) "The Act requires that all the company does shall be preceded by a notice—a notice of that which is to be the subject of the inquiry before the jury; and if I were to hold that they might exclude from the consideration of the jury part of that which was comprised in the notice, it would be in the power of the company, after having given notice to take particular property, to subdivide that property into as many subjects of inquiry before the jury as they may think fit. . . . I find no authority to subdivide the contract, as the company have done in this case, and that without any new notice to the party, who has no means of knowing what it is which is to be the subject of inquiry before the jury": *per* Lord Cottenham, C., in *Stone v. Commercial Ry.* (1839), 4 Myl. & Cr. at p. 125; 48 R. R. 32.

(2) "It has been settled in these courts long ago by the decision of Lord Cottenham in *Stone v. Commercial Ry.* (*supra*) that where there is one entire notice to treat all the proceedings subsequent to that must have relation to the whole thing comprised in that notice to treat"; *per* Malins, V.-C., in *Ecclesiastical Commissioners v. Commissioners of Sewers of the City of London* (1880), 14 Ch. D. at p. 308.

(n) Effect when lessee's interest is taken.

- (i.) A company purchasing a leasehold interest can be compelled within a reasonable time to take an assignment with the usual covenants (and see *ante*, p. 50).

Illustration.

A railway company which, after giving a notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, will, at the suit of the lessee, within a reasonable time, be compelled to accept an assignment containing the usual covenants: *Harding v. Metropolitan Ry.* (1872), L. R. 7 Ch. 154. "I have no doubt that a company purchasing a leasehold interest, as this company has done, is bound to enter into an engagement to indemnify the vendor against the covenants of his lease": *per* Lord Hatherley, C., at p. 159, *ib.*

- (ii.) Notice to treat abrogates a covenant not to assign; it likewise abrogates a covenant not to permit building (see *ante*, p. 92).

Illustrations.

(1) A railway company gave notice to treat as to part of certain lands held on lease by the plaintiff. The price was agreed, but the company refused to complete unless the lessor was a party to the assignment, the lease containing a covenant not to assign without his consent. In an action for specific performance:—*Held*, that the covenant against assignment was abrogated by the notice to treat: *Slipper v. Tottenham and Hampstead Junction Ry.* (1867), L. R. 4 Eq. 112. The principle is analogous to that of a bankrupt lessee, who is absolved from liability to pay rent by the assignment, under the Bankruptcy Acts, of his lease: *Wadham v. Marlowe* (1785), 8 East, 314, *n.*; 9 R. R. 456.

(2) A landowner had covenanted for himself and his assigns not to permit any building upon certain lands. A railway company acquired these lands under their compulsory powers, and erected a station. In an action on the covenant it was *held* that the landowner was excused: *Baily v. De Crespigny* (1868), L. R. 4 Q. B. 180.

- (iii.) The liability of a tenant to repair continues at any rate until the company takes possession; other covenants, however, may be discharged (and see *ante*, p. 92).

Illustration.

In 1859 the plaintiff granted a lease to the defendants for twenty-one years, determinable at the option of either party at the end of seven or fourteen years. At the end of the first seven years a railway company served notice to treat on the lessees for the purchase of their interest, and compensation was paid and possession taken. In 1868 the company gave notice to treat to the plaintiff in respect of his interest. He sent in a claim, but nothing further was done, the proposed railway being abandoned. In 1871 the plaintiff sued the lessees for breaches of their covenant to repair accruing as well before as since the assignment by them to the company:—*Held*, that the liability of the lessees did not

cease until the day when the company took possession : *Mills v. East London Union* (1872), L. R. 8 C. P. 79.

(o) Where one notice to treat is given in respect of the whole of one property and part only of a second, the owner cannot treat the notice as two distinct notices if he has given a counter-notice calling upon the promoters to take the whole of the second property.

Illustration.

The owner of two adjacent properties received one notice to treat in respect of the whole of one of them and a part of the other, and thereupon served a counter-notice requiring the company to take the whole of the latter. The company then gave notice abandoning the notice to treat ; but the owner said he was entitled to treat the notice as being applicable to one property without the other :—*Held*, that there was only one notice to treat, and that the owner was not entitled to treat the notice as two notices : *Thompson v. Tottenham and Forest Gate Ry.* (1892), 67 L. T. 416.

(p) The period of giving notice to treat fixes the time at which the amount of compensation is to be computed.

Illustrations.

(1) Where leasehold premises were held, under the terms of a will, to be used by the testator's sons so long as they should continue to carry on the business there, after which they were to be sold, and notice to treat was given as to the premises and compensation assessed by a jury at 8,222*l.* for the executor of the will on the footing of his being entitled to the whole residue of the term in the premises, and at 4,070*l.* for the sons :—*Held*, that the valuation of the executor's interest ought to be made as of the interest which, at the moment when the notice to treat was given, he would have had if the premises had not been taken ; and that the sons were entitled to a sum equal to the present value of the improved rent of the premises beyond the rent and outgoings payable by them for the residue of the term during their lives and the life of the survivor, subject to a deduction in respect of the chance that they might have ceased to carry on the business : *Penny v. Penny* (1868), L. R. 5 Eq. 227. "I think the valuation ought to be made as at the time when the house was about to be taken, and *should be made of the exact interest which the plaintiff would at that moment have had*, assuming that the house had not been taken. . . . It is not the interest which has been acquired by the board that has to be estimated, but the value of the interest taken from the person with whom the board deals. . . . The scheme of the Act I take to be this : that every man's interest shall be valued, *rebus sic stantibus*, just as it occurs at the very moment when the notice to treat was given" : *per* Page Wood, V.-C., at pp. 235, 236, *ib.*

(2) A special Act required six months' notice in writing to be given by the promoters of their intention to take lands. They gave such notice to a tenant. At the date when such notice was given more than a year, but at the expiration of the notice less than a year, of the tenancy remained. It was *held* that for the purposes of sect. 121 of the Lands Clauses Act the tenant's interest at the date of the giving of the notice, and not at the date of its expiration, was to be considered : *Tyson v. London Corporation* (1871), L. R. 7 C. P. 18. "The notice to treat, when given, would have relation to the time at which a notice had been given that the land was to be taken compulsorily under the provisions of the Act. . . . It [the notice] is not to be treated as merely an intimation that the promoters will take, if they afterwards make up their minds to give a notice to treat. That

being so, it appears to me that the period of giving such notice is the period to which all questions relating to the right to compensation must be referred": *per* Willes, J., at p. 22, *ib.*

(3) The publication, under the Railways (Ireland) Act, 1851, s. 8, of the notice of the arbitrator's appointment is equivalent to service of notice to treat, and fixes the time at which the computation of value is to be assessed: *In re Doyne's Traverses* (1888), 24 L. R. Ir. 287.

Service of Notices
on Owners and
Occupiers of
Lands.

19. All Notices required to be served by the Promoters of the Undertaking upon the Parties interested in or entitled to sell any such Lands shall either be served personally on such Parties or left at their last usual Place of Abode, if any such can after diligent Inquiry be found, and, in case any such Parties shall be absent from the United Kingdom, or cannot be found after diligent Inquiry, shall also be left with the Occupier of such Lands, or, if there be no such Occupier, shall be affixed upon some conspicuous Part of such Lands.

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Mode of service of notices on owners and occupier.

(a) The procedure of sect. 19 must be strictly adhered to.

Illustration.

"It seems to me that if parties are insisting upon their rights under this statute, those are the only ways [*i.e.*, those provided by sect. 19 of the Lands Clauses Act]; and that one of those ways must be followed if the parties are intending to have their rights carried out under the Act. Of course, notice might be given in a different way, and if it is accepted, well and good. That may be a good contract outside the Act; but if the notice under which the rights of the parties are to be enforced is given under the Act, it appears to me that it must be given in one of the ways prescribed by the Act, or it is not a good notice under the Act." "It seems to me that to bind [the owner] there must be service under the Act, and that to bind the corporation therefore there must also be service under the Act": *per* North, J., in *Shepherd v. Norwich Corporation* (1885), 30 Ch. D. at pp. 570, 573.

(b) Service of notice to treat upon an agent will not bind the principal, and it seems that this is so although the agent may have been authorised.

to accept service, unless the principal recognises and acts upon the notice.

Illustrations.

(1) An Act of Parliament required that notices should be served upon certain corporations at their place of business:—*Held*, that service upon a person whom the corporation recognised as attorney, and whose acts in respect of such service had been adopted, was valid to support subsequent proceedings taken upon such service: *R. v. Maryport and Carlisle Ry.* (1850), 15 L. T. (O.S.) 134.

(2) “It seems to me that it [the notice] never really came to the plaintiff’s hands at all, and that if, in point of fact, it did come to his agent or solicitor, that is not enough under the Act. There is nothing to show that W. was such an agent as had any authority to accept service of such a notice on behalf of Shepherd, and of course his solicitor had not any such authority. An agent or solicitor might have such authority, but there must be something to show that he had. . . . Even if I had come to the conclusion that there was such an authority, it seems to me that an authorised agent is not a person upon whom service under the Act of a notice to treat can be effected so as to bind the principal of that agent”: *per* North, J., in *Shepherd v. Norwich Corporation* (1885), 30 Ch. D. at p. 573.

(c) A notice served upon a landlord does not bind his tenant, and a notice served upon the occupier without any attempt being made to discover the owner will not bind the owner.

Illustrations.

(1) The defendants handed to A., the landlord of the prosecutors [tenants], at the office of the latter, notices to treat, addressed to A. and the prosecutors respectively. The prosecutors were not on the premises at the time, and A. did not hand to them their notice or communicate with them in regard to same:—*Held*, that the prosecutors had not been served: *per* Lush, J., in *R. v. Great Northern Ry.* (1876), 2 Q. B. D. at p. 154.

(2) The N. Corporation, three days before their compulsory powers of purchase under a special Act expired, left a notice to treat on S.’s premises addressed to W. (an under-tenant of S. as to a small part of the property) and all other persons having an interest in the property. W. was the agent of S. in the management of the property. W. took the notice to S.’s solicitor and wrote to S., but it did not appear that S. knew of the matter till the three days had expired. Some days later S. served the corporation with a counter-notice to purchase the whole of his property. S. withdrew this notice and required the corporation to proceed under their original notice to treat. The corporation refused. S. brought an action for specific performance, and for a *mandamus* to proceed with the completion of the purchase:—*Held*, that there was no valid service of the notice: *Shepherd v. Norwich Corporation* (1885), 30 Ch. D. 553.

(d) A notice to be valid under the section against promoters and owners must operate against both.

Illustration.

“The notices did not reach the prosecutors, [tenants] who consequently were not bound thereby; the service was informal, for the requirements of sect. 19 were not complied with: the notices were not served personally, nor were they left at the prosecutor’s last usual place of abode, and there was no ‘diligent inquiry’; and if the prosecutors were not bound the defendants were not, for in order that the notice should be valid it was necessary that it should operate against both parties”: *per* Lush, J., in *R. v. Great Northern Ry.* (1876), 2 Q. B. D. at p. 154.

(e) If the special Act contains provisions as to service they must be strictly complied with.

Illustration.

By the defendants' Act it was provided that they should, within twelve months, give notice to the testamentary guardian of an infant. There were pending other proceedings in which the plaintiff (the infant) was represented by a next friend, and the notice was, within the time limited, served upon the next friend; but it was not until after the expiration of twelve months that any notice was served upon the guardian :—*Held*, that no notice had been given under the Act, and that the company must be restrained from taking the land : *Harrington (Earl) v. Metropolitan Ry.* (1866), 13 L. T. 658.

(f) Meaning of “last usual place of abode.”

Similar words to “last usual place of abode” in sect. 3 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), were construed to mean “the then present place of abode, if the party have any; the last which he had if he has ceased to have any”: *per Coleridge, J.*, in *R. v. Evans* (1850), 19 L. J. M. C. 151, 154.

NOTE.—Sect. 3 of 7 & 8 Vict. c. 101 was repealed by 35 & 36 Vict. c. 65, s. 2.

20. If any such Party be a Corporation aggregate such Notice shall be left at the principal Office of Business of such Corporation, or, if no such Office can after diligent Inquiry be found, shall be served on some principal Member, if any, of such Corporation, and such Notice shall also be left with the Occupier of such Lands, or, if there be no such Occupier, shall be affixed upon some conspicuous Part of such Lands.

The notice will not be rendered invalid by a mere clerical error in the address if the addressee is not misled thereby, if the notice is otherwise valid and validly served.

Illustration.

In an action against the Blackburn Railway Co. the plaintiff caused a notice under sect. 68 of the Lands Clauses Act to be served upon a clerk in the employ of the promoters of “the Blackburn Railway” at their office. The notice was directed to “the promoters of the Blackburn and Clitheroe Railway Co.” There was no railway known by this name, but the railway in question ran from Blackburn to Clitheroe. It did not appear that the defendants had been misled by the error :—*Held*, that the notice was good : *Eastham v. Blackburn Ry.* (1854), 23 L. J. Ex. 199.

And see the last section.

If Parties fail to treat or in case of Dispute, Question to be settled as after mentioned.

21. If for Twenty-one Days after the Service of such Notice, any such Party shall fail to state the Particulars of his Claim in respect of any such land, or to treat with the

Promoters of the Undertaking in respect thereof, or if such Party and the Promoters of the Undertaking shall not agree as to the amount of the Compensation to be paid by the Promoters of the Undertaking for the Interest in such Lands belonging to such Party or which he is by this or the Special Act enabled to sell, or for any Damage that may be sustained by him by reason of the Execution of the Works, the Amount of such Compensation shall be settled in the Manner hereinafter provided for settling Cases of disputed Compensation.

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I. Modes of assessment of compensation.

After the service of the notice to treat, the next stage in the relations between owner and promoters is the consideration of the amount of

compensation due to the owner. For this purpose sect. 21 allows twenty-one days within which—

- (1) The owner may, if he deems it advisable, deliver to the promoters particulars of his claim ; or
- (2) Treat with the promoters of the undertaking as to the property ; or
- (3) Agree with the promoters for the absolute sale to them of the property and all interests therein as well as any compensation for damage by the execution of the works (*see* sects. 6—15, *ante*).

NOTE.—As to the damage above referred to, sects. 49 and 63 provide for the assessment thereof where land is taken and sect. 68 where no land is taken.

Failing agreement by the parties, there are in the Lands Clauses Acts four methods for settling the amount of compensation for land taken or injuriously affected. These are as follow :—

- (1.) By arbitration (*see* sects. 23, 64, 68, and 130).
- (2.) By a jury (*see* sects. 23 and 68).
- (3.) By justices (*see* sects. 22, 68, and 121).
- (4.) By a surveyor (*see* sects. 47, 58, 85, and 106).

II. The period of twenty-one days in sect. 21 does not apply to a counter-notice given under sect. 92, *post*.

Illustration.

Where in June, 1853, the promoters served a notice on S. under sect. 18 of the Lands Clauses Act stating that they required certain specified parts of S.'s property, and S. served a counter-notice under sect. 92 :—*Held*, that the term of twenty-one days did not apply to a counter-notice under sect. 92, and that if the promoters intimated their assent to take the whole, and their readiness to treat, they were not bound to wait the twenty-one days from service of notice before any further proceedings were taken : *Schwinge v. London and Blackwall Ry.* (1855), 24 L. J. Ch. 405.

III. Particulars of claim.

See sect. 23.

IV. Basis of compensation.

See sect. 63.

V. Compelling promoters to proceed.

(a) If, after giving notice to treat, the promoters of the undertaking refuse or neglect to proceed, they may be compelled to do so either—

(i) by means of a prerogative writ of *mandamus* ; or (ii.) by means of an action for a *mandamus*.

Illustrations.

(1) E. obtained a *rule nisi* for a *mandamus* to a railway company to summon a jury to assess compensation for damage. The company agreed, but not under seal, to pay a sum and 8*l.* a week so long as the injury lasted. After a short time they ceased to pay the 8*l.* a week :—*Held*, that as the agreement was not under seal it could not be enforced by action, and that a *mandamus* should issue commanding the company to pay the money according to the agreement, or to summon a jury to assess compensation : *R. v. Bristol and Exeter Ry.* (1845), 3 Rail. Cas. 777.

(2) The Commissioners of Woods gave notice to treat for lands under the powers of 9 & 10 Vict. c. 38 :—*Held*, that a *mandamus* would lie to compel them to issue their warrant for a jury. The fact of the commissioners having no funds was a matter to be raised on the return : *R. v. Commissioners of Woods* (1848), 17 L. J. Q. B. 341 ; but see S. C. on return to writ (*infra*).

(3) A railway company gave notice that certain lands would be required for their line, and steps were taken to have the amount of compensation determined by arbitration. The parties being unable to agree upon the selection of an umpire, nothing was done. The time allowed within which the Board of Trade were at liberty to make such an appointment having expired, the claimant gave notice to the company requesting them to issue their warrant to the sheriff to summon a jury to assess the compensation. This notice further stated that, in case the company omitted to do so within one week, application would be made to the Court for a *mandamus* :—*Held*, that the claimant was entitled to call upon the company to issue their warrant for the assessment of compensation by a jury, notwithstanding that previous proceedings by arbitration had been commenced ; and that on refusal by the company, a *mandamus* would be granted to compel them to issue such warrant : *Ex parte Senior, In re South Yorkshire, Doncaster and Goole Ry.* (1849), 7 D. & L. 36.

(4) By 9 & 10 Vict. c. 38 the Commissioners of Woods and Forests were authorised to treat for and purchase lands for the purpose of forming Battersea Park. Notice of intention to take lands belonging to an owner was given him, but there was no actual taking :—*Held*, that a *mandamus* would not lie to compel the Commissioners to issue their warrant to the sheriff to summon a jury to assess compensation : *R. v. Commissioners of Woods* (1850), 15 Q. B. 761.

NOTE.—This is an exceptional case owing to the fact that the Commissioners were acting on behalf of the Crown, and had, moreover, only limited powers under their Act (see *ante*, p. 148).

(5) D., the tenant for life of land held under a lease for lives renewable, was served with notice to treat by a railway company, and thereupon a memorandum of agreement signed and sealed by D., but not by the company, was drawn up whereby the company agreed to pay D. the sum of 1,250*l.*, and that a jury should be summoned at the instance of the company to find a verdict for that sum. The company took possession and executed some of their works, but neither summoned the jury nor paid the money :—*Held*, that in such a case a *mandamus* would be granted to summon a jury, and that it was no valid return to such *mandamus* to say that such agreement was binding on the company, and that it could be enforced in equity, as they had acted on it : *R. v. Irish South-Eastern Ry.* (1850), 1 Ir. C. L. R. 119.

(6) A ferry company, acting within their statutory powers, gave notice to treat with respect to certain land required, and the plaintiffs accordingly delivered a notice requiring their interest to be ascertained by arbitration. The company deposited the estimated

value of the property in question and took possession under sect. 85 of the Lands Clauses Act. After much discussion the arbitration proceedings fell through. In the meantime the company had gone on with the execution of their works. The plaintiffs did not apply for an injunction, but interrupted the execution of the work :—*Held*, (1) that the plaintiffs' proper remedy was for a *mandamus* to compel the summoning of a jury to assess the compensation ; and (2) that no injunction could be granted to restrain the defendants, the plaintiffs having taken the law into their own hands, and not having made application at once for an injunction : *Lind v. Isle of Wight Ferry* (1862), 7 L. T. 416 ; see *ante*, pp. 151, 152.

(7) A railway company having given F. a notice to treat as to property required for the purpose of constructing a railway, F. claimed compensation, delivered particulars of his interest, and gave notice of his desire to have the compensation assessed by a jury. The company refused or neglected to proceed in the matter :—*Held*, that there was a duty on the part of the company to issue a warrant for the summoning of a jury within a reasonable time after notice had been given them, a breach of which gave a right of action, and that an action for a *mandamus* lay whether the plaintiff was entitled to damages for non-issue or not : *Fotherby v. Metropolitan Ry.* (1866), L. R. 2 C. P. 188. "The defendants are a railway company, and gave notice to the plaintiff that they should require his land, and thereby created, in accordance with the provisions of the Lands Clauses Act, a relation approximating to that of vendor and purchaser, and the plaintiff became entitled, under the provisions of the Act, to require that the defendants should proceed to ascertain the value of the land by issuing a warrant to the sheriff to summon a jury for the purpose of assessing it, and then take the land and pay the value so ascertained. . . . I think that the Common Law Procedure Act, 1854, entitles the plaintiff to bring an action for *mandamus* against the defendants for not issuing a warrant when he can show that he has a right to have the warrant issued, and is personally interested in it whether he is entitled to any damages for its non-issue or not" : *per* Erle, C.J., at p. 193, *ib.*

(8) The Corporation of the City of London, seeking to take lands under the powers conferred by 10 & 11 Vict. c. cclxxx., as to which they had given notice to treat, were *held* to be bound to summon a jury within a reasonable time after they had received particulars of the plaintiff's claim ; *held also*, that it was no reason for refusing or delaying to do so that the plaintiff's only interest in the lands sought to be taken was a residue of a few months in an unexpired term : *R. v. London Corporation, Ex parte Mathew* (1867), 16 L. T. 673.

(9) "There was, indeed, a notion prevalent at one time that a company, by giving notice to treat, committed themselves in such a manner that a Court of equity would hold that to be an agreement upon their part from which they could not recede, and which could be enforced by the Court before the transaction had gone any further. That notion was, however, found to be erroneous ; and it was decided by Lord Cottenham in *Adams v. London and Blackwall Ry.* (1850), 2 Mac. & G. 118, that the giving notice would only authorise the person who received it to insist that the course pointed out by the Act should be taken, and that a *mandamus* would issue compelling the company to summon a jury or proceed to arbitration for ascertainment of the price. But the case is different when the price is ascertained, for you have then all the elements of a complete agreement, and, in truth, it becomes a bargain made under legislative enactment between the railway company and those over whom they were authorised to exercise their power" : *per* Lord Hatherley, C., in *Harding v. Metropolitan Ry.* (1872), L. R. 7 Ch. at p. 158 ; see *ante*, p. 153.

NOTE.—Where a misdirection by the sheriff leads the jury to assess no compensation the remedy is to apply for *mandamus* to summon another jury.

Illustration to Note.

A jury having been summoned for the purpose of determining the amount of compensation due, the sheriff came to the conclusion that the claimant's premises were not within the

distance prescribed by the Act, and directed the jury that they could not give compensation. A *mandamus* for a new hearing was granted: *Walker v. London and Blackwall Ry.* (1843). 7 Jur. 1154.

(b) The prerogative writ of *mandamus* is the appropriate remedy when irreparable injury will be inflicted upon the applicant if he cannot obtain speedy justice, or in like circumstances. In other cases, an action for a *mandamus* is the proper mode of proceeding.

Illustrations.

(1) "The remedy of a writ of *mandamus* will not be granted where there is another remedy, equally convenient and effectual, open to the applicant at the time when it becomes necessary to resort to one or other of such remedies": *per* Pollock, B., in *R. v. Lambourn Valley Ry.* (1888), 22 Q. B. D. at p. 468. "Numerous authorities established the proposition that the Queen's Bench Division, which alone has power to grant the [prerogative writ of *mandamus*] ought not to grant it if the applicant has another and sufficient remedy by action": *per* Manisty, J., at p. 469, *ib.*

(2) "It is said that even if at one time a writ of *mandamus* was the proper remedy under the Lands Clauses Act, it has ceased to be so since the Common Law Procedure Act, 1854, gave a right to a *mandamus* in an action, and for that the case of *R. v. Lambourn Valley Ry.* is cited. Of course, we deal with that case with all possible respect as a decision which binds us on a matter *in pari materia*, but there the Court was not dealing with a question of this kind. The decision in that case I have never heard questioned as a decision, and I do not suppose it ever will be. It was a dispute whether an action or a prerogative writ of *mandamus* was the proper remedy in that particular case. But Pollock, B., in the course of his judgment appears to say that it is an answer to any application for a prerogative writ of *mandamus* if it is shown that a *mandamus* could have been granted for the same purpose in an action. I say and I have said, with the assent of other judges at various times, that that would be unduly to narrow the powers of this Court to grant a prerogative writ of *mandamus*. There must be many cases in which a prerogative writ of *mandamus* ought to be granted for the purposes of speedy justice, or other reasons, in which it would be uncertain whether it was possible to achieve the same results in any other way, and if it was possible, would take too much time and difficulty": *per* Wright, J., in *R. v. London and North-Western Ry.*, [1894] 2 Q. B. at p. 518.

(c) It is essential, before an application for a *mandamus* is made, that the promoters should have been called upon to proceed, for example to issue their warrant for a jury, and that the promoters should have refused, or at least neglected, to proceed.

Illustrations.

(1) On November 29th V. sent in a claim for compensation with respect to injury done to his mill by the works of the company. He was informed that there would be a meeting of the committee of management on December 26th, but that that would be a matter of form, and that there would be another meeting in March, when his claim would be submitted to the committee. On January 23rd V. applied for a *mandamus* to the company to issue their warrant to the sheriff:—*Held*, that there was nothing in

the circumstances showing a refusal on the part of the company to consider the claim, and that mere delay in doing so was not enough: *R. v. Wilts and Berks Canal* (1840), 8 D. P. C. 623.

(2) A notice to treat having been served by a railway company upon S., he gave notice to the company of his desire to have the amount of compensation determined by arbitration. Two arbitrators were accordingly appointed, but they could not agree upon an umpire. An application to the Board of Trade to appoint one was then made, but this the Board refused to do, on the ground that the time for making such an appointment had gone by. S. thereupon gave notice to the company calling upon them to issue their warrant for a jury. The company made no direct refusal to issue their warrant; but gave S. notice of their relinquishment of the right and intention to take the land:—*Held*, that no precise or formal notice of refusal was required to be given; and a writ of *mandamus* was granted commanding the company to issue their warrant: *Ex parte Senior, In re South Yorkshire, Doncaster and Goole Ry.* (1849), 7 D. & L. 36.

(d) The Court will, in a proper case (*i.e.*, where there are urgent circumstances), grant a *mandamus* upon an interlocutory application, under the power conferred by sect. 25, sub-sect. 8, of the Judicature Act, 1873.

Illustration.

On October 25th, 1875, a notice to treat was served on the plaintiffs. On December 3rd, 1875, notice of claim was sent in, and the promoters were called upon under sect. 93 of the Lands Clauses Act to take a small additional piece of land beyond what was described in the notice to treat. On July 4th, 1876, a further notice to treat for this additional land was served. On May 1st, 1877, the first notice to treat was, by notice, withdrawn. The plaintiffs therefore brought an action claiming damages and a *mandamus* commanding the promoters to issue their warrant for a jury:—*Held*, that the Court had power, under sect. 25, sub-sect. 8, of the Judicature Act, in a case where the Court deemed it just or convenient so to do, to grant a *mandamus* upon an interlocutory application. In the present case, however, there was nothing to show that the plaintiffs would suffer injury by waiting for the result of the action: *Widnes Alkali Co. v. Sheffield and Midland Ry.* (1877), 37 L. T. 131.

NOTE.—“I think the *mandamus* spoken of in the 8th sub-section of the 25th section of the Judicature Act, 1873, is not the prerogative *mandamus*, but only a *mandamus* which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie”: *per* Brett, L.J., in *Glossop v. Heston Local Board* (1879), 12 Ch. D. at p. 122.

(e) If the promoters do not proceed within a reasonable time, the owner may be entitled to damages as well as to a *mandamus*. The promoters may, through their delay, become liable to pay the whole sum claimed by the owner, if they have taken possession or caused damage.

Illustrations.

(1) “If, after the service of a notice to treat, the person served replies by stating his interest and claiming compensation, and the company neither refer the matter to arbitration nor issue a warrant for a jury, they must be deemed to have acquiesced in the claim made, and the claimant may recover the amount”: *per* Blackburne, C.J., in *Eaton v. Midland Great Western Ry.* (1847), 10 Ir. L. R. 310.

(2) Acting under the provisions of a special Act, which incorporated the Lands Clauses Act, and also required the M. Railway Co., before entering upon or taking any property, to give six months' notice of their intention so to do to the person assessed to the relief of the poor in respect of the property, the railway company gave notice to the plaintiffs of their intention to take, at the expiration of six months, a tenement for which the plaintiffs were rated. This notice did not purport to be a notice to treat given under sect. 18 of the Lands Clauses Act, nor did it contain the particulars required under that section. The plaintiffs, in consequence of the notice, took other premises, after having informed the company of their intention so to do. The company took no further step towards obtaining possession of the plaintiffs' premises, and the plaintiffs had accordingly to continue paying the rent of the premises vacated, besides having incurred the expense and inconvenience of moving. After the expiration of the six months the plaintiffs brought an action for damages and for a *mandamus*:—*Held*, that the company was bound to proceed with the purchase within a reasonable time after the six months had elapsed, and that the plaintiffs were entitled to substantial damages and to a *mandamus*: *Morgan v. Metropolitan Ry.* (1868), L. R. 4 C. P. 97.

(f) In a case before the Act a *mandamus* to a company commanding them to summon a jury to assess compensation was not granted where the works calculated to damnify the claimant were still *bonâ fide* proceeding, although the applicant also claimed for land taken and there had been much delay in carrying on the works.

Illustration.

"I think the Court would say that you ought to wait till the company has done all the damage they are likely to do and then a jury would assess compensation for the whole": *per Coleridge, J.*, in *Ex parte Parkes* (1841), 9 D. P. C. at p. 616.

(g) As Acts of Parliament empowering companies to make railways or similar undertakings are enabling merely and not obligatory, a *mandamus* will not lie to compel a company to put in force its statutory powers.

Illustrations.

(1) Powers were obtained for the construction of a railway within the usual period of three years. The promoters took some preliminary steps towards the construction of the railway, but afterwards abandoned the undertaking, and their funds became exhausted:—*Held*, that the rule for a *mandamus* must be made absolute, as it had not been possible to show that the compulsory powers could not now be exercised: *R. v. Lancashire and Yorkshire Ry.* (1851), 20 L. J. Q. B. 507, *n*.

(2) A railway company's special Act provided that the powers of the company for the compulsory purchase of lands for the purposes of the Act should not be exercised after the expiration of three years from the passing of the Act; and by sect. 20, "that the works hereby authorised shall be complete within five years from the passing of this Act, and on the expiration of such period the powers granted to the company for executing the same shall cease to be exercised, except as to so much of the same respectively as shall then be completed." The power of compulsory acquisition having expired in July, 1849:—*Held*, that the promoters could not be compelled by writ of *mandamus* to purchase the lands necessary for making a branch railway, and therefore there was no occasion to decide the question whether a return of want of funds was a good answer to the writ: *R. v. London and North-Western Ry.* (1851), 6 Rail. Cas. 634.

(3) A railway company was authorised to construct a railway and to acquire land for the purpose. They constructed part of the railway, and did not proceed with the rest. Certain of the landowners from whom they had acquired land for the portion constructed applied for a *mandamus* to compel the company to complete the line :—*Held* that, the statute being permissive, there was no obligation upon the company to complete such as would support the granting of a *mandamus* or an indictment : *York and North Midland Ry. v. Reg.* (1853), 7 Rail. Cas. 459.

(4) A railway company obtained an Act for making a branch within seven years. They gave the usual notices. The company never executed or began to execute the branch, and the seven years expired :—*Held*, that the company were not bound to execute or begin to execute the branch : *Edinburgh, Perth and Dundee Ry. v. Philip* (1857), 2 Macq. 514.

(5) A company, after getting their Act, determined to abstain from executing the line which it sanctioned :—*Held*, that the company could not be compelled to proceed : *Scottish North-Eastern Ry. v. Stewart* (1859), 3 Macq. H. L. 382.

(h) The question whether the compensation has been rightly assessed cannot be raised upon showing cause against the rule *nisi* for a *mandamus*.

Illustrations.

(1) H. applied for a *mandamus* to command a company to take up an award under the Lands Clauses Act. The company wished to raise objections on account of defects in H.'s notice under sects. 23 and 68 of the Act :—*Held*, that they could not be allowed to do so : *R. v. Sutton Harbour* (1853), 2 W. R. 10.

(2) A railway company were called upon to appoint an arbitrator to assess compensation, but refused. The claimant's arbitrator proceeded and made his award, which the company refused to take up :—*Held*, that a *mandamus* should go to command them to do so, as the company could raise the question of who should take up the award on the return : *R. v. West Midland Ry.* (1862), 10 W. R. 583.

(3) The plaintiffs, owners of minerals under and near a railway, gave notice to the defendant company that they were desirous of working the minerals under and within forty yards of the railway, unless the company were willing to treat for the purchase of and make compensation for the same. The company gave counter-notice of their desire to purchase certain portions of the minerals. An arbitration was held under sect. 35 of the Lands Clauses Act, at which the company appeared under protest, contending that the rights of the claimants were governed by a special Act of 1833. They asked the arbitrator to make an alternative award, which he declined to do, and he made his award assessing the amount of compensation to be paid. The company declined to take up the award, and a *mandamus* commanding the company to take up the award was applied for :—*Held*, that the question whether the assessment of the amount of compensation to be paid should have been made under the Railways Clauses Act or under the repealed Act of 1833 could not be entertained upon showing cause against the rule *nisi* to take up the award : *London and North-Western Ry. v. Walker*, [1900] A. C. 109.

(i) An application for a prerogative writ of *mandamus* must be made in the King's Bench Division : Crown Office Rules, 1886, No. 60.

See, further, "Annual Practice," Ord. LIII., and notes.

Illustration.

In *Sutton Harbour v. Hitchens* (1853), 16 Beav. 381, Romilly, M.R., refused to make an order compelling the company to take up the order made in the case, saying that the Court had no primary jurisdiction to make such an order and that the parties had conferred no such power upon the Court.

(k) No second application for a prerogative writ of *mandamus* will be granted when the first application has been discharged.

Illustration.

"As I read the authorities, it has always been held, whenever this objection has been taken and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. . . . It is, no doubt, extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused": *per* Day, J., in *R. v. Bodmin Corporation*, [1892] 2 Q. B. at p. 22.

(l) An application for a *mandamus* must be made by counsel.

Illustrations.

(1) K. appealed in person from an order discharging a rule *nisi* for a *mandamus* :—*Held*, by the Court of Appeal, that on such applications counsel must be instructed, and the case was adjourned so that this might be done : *R. v. Liverpool Corporation* (1891), 7 T. L. R. 592.

(2) "The rule of practice has been clear for many years that a writ of *mandamus* can only be moved for by counsel. . . . We must, therefore, refuse to hear the application until the applicant has instructed counsel to make it on his behalf": *per* Collins, M.R., in *Ex parte Wallace*, [1902] 2 K. B. 488.

(m) A writ of *mandamus* will lie to justices compelling them to proceed to settle the amount of compensation if they decline to act; an *action of mandamus* is not available in such a case.

Illustrations.

(1) "When private persons had rights one against the other, the Court had power to grant a *mandamus*, or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. . . . But it was never contemplated that a private *mandamus* should be granted in cases in which a prerogative *mandamus* had, from time whereof memory does not run to the contrary, been alone the effective remedy": *per* Day, J., in *Barter v. London County Council* (1890), 63 L. T. at p. 771.

(2) N. held land under a lease for thirty years from 1889, with power reserved to the lessor to determine the lease for certain purposes, upon giving three months' notice. On May 14th, 1891, a railway company gave N. notice to treat for a certain portion of the land, but nothing was done under the notice. On June 30th, 1892, the lessor gave N.

three months' notice to determine the lease as to that portion. On July 20th, 1892, the company gave notice to take possession under sect. 85 of the Lands Clauses Act. A summons was then taken out before a police magistrate under sect. 121 for the purpose of assessing compensation due to N. for his unexpired interest in the term. The magistrate declined jurisdiction, on the ground that the interest at the date of the notice to treat, and not at the date of possession, must be regarded, and that N.'s interest at the time of notice to treat was greater than that of a tenant from year to year :—*Held*, that the magistrate was wrong, as the proceedings were not taken under the notice to treat, but in pursuance of the company's having taken possession; and a *mandamus* was granted directing him to proceed to assess the compensation: *R. v. Kennedy* (1893), 62 L. J. M. C. 168.

(n) Return to *mandamus*.

- (i.) It is a good answer to show that the applicant has accepted a sum of money in satisfaction of his claim.

Illustration.

Mandamus averring that B. had an interest in and was the occupier of certain property alleged to be injuriously affected by the execution of a railway company's works, for which cause B. claimed compensation, and duly appointed his arbitrator under the Lands Clauses Act, and gave notice of the appointment to the company, and called upon them to appoint their arbitrator. The company having failed or refused to do this, B. appointed L. to act as arbitrator on behalf of both parties. L. made his award, and thereupon B. gave notice thereof to the company, and required them to take up the award, which the company refused to do. The return by the company averred that B. was the occupier of certain other land which the company had taken, and that he had agreed with the company to accept the sum of 22l. 10s. as compensation both for his interest and for the prospective damage which he might afterwards sustain by reason of the execution of the contemplated works. It was further alleged that the award made was bad and that the company were not bound to take it up :—*Held*, a good return: *R. v. West Midland Ry.* (1863), 11 W. R. 857.

- (ii.) It was held in one case a good answer to show that the applicant was not entitled to any compensation.

Illustration.

A *mandamus* recited that G. O.'s ferry had been injuriously affected by the works of a railway company; that the parties had proceeded by arbitration under sect. 25 of the Lands Clauses Act; and that the umpire had made his award; and commanded the railway company to take up the award and furnish a copy to G. O. (the prosecutor). The railway company returned that G. O.'s ferry had not been injuriously affected by their works within the meaning of the Act, and that G. O. was not under the Act entitled to compensation. On demurrer :—*Held* to be a good return: *R. v. Cambrian Ry.* (1869), L. R. 4 Q. B. 320. "If the prosecutor succeeds in the traverse to the return, he will get a peremptory *mandamus*": *per* Cockburn, C.J., at p. 322, *ib.*; see note on p. 233, *post*.

- (iii.) Want of jurisdiction or authority to make the award is likewise a good answer.

Illustration.

It is a good answer to an application for a *mandamus* to take up an award that the umpire had proceeded under the wrong Act, and had no jurisdiction to make an award: *R. v. London and North-Western Ry.*, [1899] 1 Q. B. at p. 945.

(o) The proper mode of recovering the amount of compensation found to be due to the claimant is now by action, and not by *mandamus*

Illustrations.

(1) By an Act authorising (*inter alia*) the construction of a railway bridge over a river, it was enacted that if the effect of such construction should prove to be a reduction in the amount of tolls received by the proprietors of a neighbouring bridge, during the three years next after the opening of the railway for traffic, the railway company should pay to the proprietors of the bridge compensation equal to ten years' purchase of the computed annual decrease in the tolls. Application was made on behalf of the proprietors for a *mandamus* compelling the payment of the sum claimed :—*Held*, that an action of debt lay, and was not a less effectual remedy than a *mandamus*, and that, therefore, the latter must be refused : *R. v. Hull and Selby Ry.* (1844), 6 Q. B. 70.

(2) "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced, and the same rule applies to inferior Courts in this country, and applies equally whether they be Courts of record or not" : *per* Parke, B., in *Williams v. Jones* (1845), 13 M. & W. at p. 633.

NOTE.—Recovery of costs is provided for by sect. 53, *post*.

(3) The G. E. Railway Co. took under their powers lands of B. An arbitrator was appointed, who duly made his award. The company were not satisfied with B.'s title. B. brought an action (*inter alia*) for a *mandamus* for the company to pay the money into the bank :—*Held*, that sect. 168 of the Common Law Procedure Act, 1854, applied to claims arising under sects. 23 and 76 of the Lands Clauses Act, and that B. ought to have judgment for a *mandamus* : *Barnett v. Great Eastern Ry.* (1868), 16 W. R. 793.

NOTE.—The provisions of the Common Law Procedure Act, 1854, as to the action of *mandamus* have been superseded by those of Ord. LIII. of the Rules of the Supreme Court, whereby the person entitled to it may obtain a *mandamus* commanding the defendant to perform the duty in question. No writ of *mandamus* is now issued in an action, the *mandamus* being issued by way of judgment or order.

(4) A local authority, by raising the level of a street, affected the access to a house of which P. was the owner, who thereupon claimed compensation and appointed his arbitrator. The local authority did not appoint an arbitrator, and therefore P.'s nominee proceeded *ex parte* and awarded him compensation for the injury. The sum awarded not having been paid, an action was brought to recover it, in which the liability of the defendants was established, but it was contended that the action would not lie, on the ground that the question of liability ought to have been decided before the amount of compensation was assessed :—*Held*, that the action lay and that P. was entitled to succeed : *Pearsall v. Brierley Hill Local Board* (1883), 11 Q. B. D. 735 ; affirmed 9 App. Cas. 595.

VI. Where special tribunal has ceased to exist.

Where the tribunal appointed to assess compensation has ceased to exist, the powers of the promoters to continue their works may still be exercised, and the remedy of the owner of land is by action.

Illustrations.

(1) By a navigation Act the undertakers were authorised to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose : and to enter and make works upon lands for the purposes of the undertaking, first making satisfaction to the owners. By a subsequent clause, any person injured by the works was to receive compensation, to be assessed by the commissioners named in the Act or their successors appointed by themselves. The navigation was made, and, as part of it, a dam across a river was enlarged. Afterwards all the commissioners died, without having appointed successors. The company afterwards raised the dam, to the injury of a mill-owner below :—*Held*, that the powers to alter the dam still existed, even although the mill-owner should no longer have any means of obtaining compensation, as to which they gave no opinion ; but *held* by Campbell, C.J., *diss.*, that, the compensation clause having become incapable of execution through the extinction of the commissioners, the powers conferred upon the company to cause injury to other persons could no longer be exercised : *Kennet and Aron Navigation v. Witherington* (1852), 18 Q. B. 531.

(2) By the statute 12 Geo. I. c. xxxviii., the predecessors in title of the defendants were authorised, as undertakers of a river navigation, to clear, scour, straighten or deepen the river, and to remove all obstructions, and to lay all gravel, rubbish and other dredgings on the banks of the river or on the lands thereto adjacent, making satisfaction to the respective owners for any damage occasioned. Certain persons were appointed commissioners to settle and determine any differences that might arise as to the compensation to be paid to the owners for damage done to their lands. The Act further provided that any fifteen or more of the commissioners might meet and appoint substitutes or successors to those who died or refused to act. All the commissioners named in the Act died long before the present action, and no substitutes or successors were then in existence :—*Held*, that a landowner whose land had been damaged by the exercise by the defendants of their power under the statute to deposit upon his land dredgings from the river was entitled to enforce the payment of compensation by action. An inquiry as to the amount of damage was ordered : *Bentley v. Manchester, Sheffield and Lincolnshire Ry.*, [1891] 3 Ch. 222.

Disputes as to Compensation where the Amount claimed does not exceed 50*l.* to be settled by Two Justices.

22. If no Agreement be come to between the Promoters of the Undertaking and the Owners of or Parties by this Act enabled to sell and convey or release any Lands taken or required for or injuriously affected by the Execution of the Undertaking, or any Interest in such Lands, as to the Value of such Lands or of any Interest therein, or as to the Compensation to be made in respect thereof, and if in any such Case the Compensation claimed shall not exceed Fifty Pounds, the same shall be settled by Two Justices.

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Preliminary.—It is provided by sect. 14 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), that the police magistrates of the Metropolis, and by sect. 1 of 21 & 22 Vict. c. 73, that every stipendiary magistrate appointed for any city, town, or district, shall have power to alone do any act and exercise any jurisdiction which is or may be directed to be done or exercised by more than one justice.

The definition of "justices" in sect. 3 of the Lands Clauses Act (*ante*) is identical with that contained in sect. 3 of the Railways Clauses Act. Both require that the justices "shall not be interested" in the matter upon which they have to adjudicate. As to disqualification by interest, or bias, *see* sect. 24, *post*.

I. This and the sections immediately preceding and following it confer a right to compensation with respect to property injuriously affected by the execution of works upon adjacent land.

Illustrations.

(1) A railway company injuriously affected lands belonging to O., after the year 1847, by works done under the powers of a local and personal Act of 1844. O. gave notice that he chose to have his claim settled by arbitration under the Lands Clauses Act; and, the railway company having done nothing, he formally appointed F. to be arbitrator for both. F. made his award, but more than three months after his appointment:—*Held*, that the Lands Clauses Act applied, and O. was therefore entitled to have his claim settled by arbitration as provided in sect. 68 of the Lands Clauses Act; but, as sect. 23 applied to arbitrations under sect. 68 for claims for damages to lands taken, as well as to arbitrations for claims as to lands *intended to be taken*, the award was out of time: *Evans v. Lancashire and Yorkshire Ry.* (1853), 1 El. & Bl. 754.

(2) S. was tenant from year to year of a public-house not touched or taken, or required to be taken, but which, it was alleged, was injuriously affected by the works of an adjacent railway. Notice had been given to the company, stating the nature of the claimant's interest and the amount of compensation claimed (under sect. 68 of the Lands Clauses Act), and the company had been required, in case they disputed the amount claimed, to issue their warrant to the sheriff to summon a jury:—*Held*, that such a claimant was entitled to have his claim determined before a jury or arbitrators, and not under sect. 121 of the Lands Clauses Act: *R. v. Middlesex (Sheriff), In re Somers and Metropolitan Ry.* (1862), 31 L. J. Q. B. 261.

(3) F. was the lessee of a house and blacksmith's shop and shoeing shop. The defendants, acting under a local Act (which incorporated the greater part of the Lands Clauses Act) and other Acts, caused the level of the footway in the street in which were F.'s premises to be raised, the consequence of which was to impede the access to the shop, and so to materially damage and injuriously affect the value of the premises:—*Held*, that F. was entitled to compensation: *R. v. Vestry of St. Luke's, Chelsea* (1871), L. R. 7 Q. B. 148. "I am clearly of opinion that the numerous provisions in the earlier portions of the Lands Clauses Act, but especially the 22nd and 23rd sections, in themselves, clearly, directly, expressly and necessarily confer a title to compensation upon the persons brought within the Act of Parliament whose interests are injuriously affected by the operations of any public body within the language of the Act": *per* Kelly, C.B., at p. 151, *ib*.

II. Right of tenant from year to year.

See sect. 121.

III. "Shall not exceed £50."

When a claim includes the value of lands taken and compensation for injurious affection, the two claims must be dealt with together, and not separately.

Illustration.

N., the lessee of property required, made three claims—(1) for the value of his interest in the land taken; (2) for damages for severance of the land on either side; (3) for injuriously affecting the land on either side:—*Held*, that the magistrates who heard the case could not try part of the claim under sect. 121 of the Lands Clauses Act, leaving the parties to go on as to the rest of the claim under sect. 68: *Bexley Heath Ry. v. North*, [1894] 2 Q. B. 579.

IV. The amount claimed, and not the amount recoverable, fixes the jurisdiction of the justices or magistrate.

Illustration.

"The issues in law raised on the second plea admit of a different consideration. That plea simply denies that the plaintiff was entitled to compensation in respect of the damage and injury to an amount exceeding 50*l.*; but we think that that plea is bad. Such a plea could only be good, we think, where the compensation *claimed* does not exceed the sum of 50*l.*": *per* Channell, B., delivering the judgment of the Court in *Read v. Victoria Station and Pimlico Ry.* (1863), 32 L. J. Ex. at p. 170.

V. Although a claim does not exceed £50, the parties may agree to refer it to arbitration as if it were a case under sect. 23.

Illustration.

"There can be no necessity for a perfect compliance with the statutory forms when both the parties agree in the appointment of an arbitrator": *per* Pollock, C.B., in *Collins v. South Staffordshire Ry.* (1852), 21 L. J. Ex. at p. 251.

VI. The settlement of compensation by justices is not an order within 11 & 12 Vict. c. 43, and the complaint need not be made within six months from the time when the matter arose.

Illustrations.

(1) The Metropolitan Board of Works having served upon M. a notice to treat in respect of his interest in property occupied by him, he sent in his claim, which was made as yearly tenant. The Board, requiring possession, served a summons upon M. to appear before a magistrate for the determination of the question and amount of compensation. At the hearing it was argued that the matter came within sect. 11 of 11 & 12 Vict. c. 43 (Jervis' Act), and therefore the application was made too late:—*Held*, that the adjudication of justices or a justice under sect. 22 of the Lands Clauses Act as to the value of an interest in lands required was not an "order for the payment of money," and therefore the summons was not out of time: *R. v. Hannay* (1874), 44 L. J. M. C. 27.

(2) A claim for 50*l.* was made on January 1st, 1884, in respect of land injuriously affected. On January 15th, 1884, the justices adjudicated thereon and awarded the amount claimed as compensation. At the time when the claim was made the line of railway which had caused the injurious affection had been finished more than two years. On an application to quash the adjudication on the ground that more than six months had elapsed from the injurious affection:—*Held*, that sect. 11 of 11 & 12 Vict. c. 43 did not apply, and that the justices had jurisdiction to make the order they did: *R. v. Edwards* (1884), 51 L. T. 586.

NOTE.—*In re Edmundson* (1851), 17 Q. B. 67; 21 L. J. M. C. 193, was overruled in this case.

VII. Neither sect. 22 nor any of the following sections confer the power to deal with any question of title or any like question: the quantum of compensation only can be dealt with by the arbitrators, umpire, jury, or justices.

(i.) Arbitrators, or umpire.

Illustrations.

(1) "By the 23rd section the only matter that the arbitrators are to decide is the amount of compensation, and they are rather valuers than arbitrators, for the costs follow of necessity under the 34th section": *per* Parke, B., *Gould v. Staffordshire Waterworks* (1850), 19 L. J. Ex. 281 at p. 282.

(2) Speaking with regard to sect. 69 of 11 & 12 Vict. c. 112, Campbell, C.J., said: "Are there any words that embrace questions of liability? It seems to me that there are not, but that the words which do follow are confined to disputes as to *quantum*": *R. v. Metropolitan Commissioners of Sewers* (1853), 1 El. & Bl. 694.

(3) A local authority constructed a sewer through land in the occupation of B. After its completion B. made a claim for compensation, which the local authority refused to entertain, on the ground that B. had suffered no damage, but they put forward no other ground for rejecting the claim. B. then nominated his arbitrator, and called upon the local authority to nominate theirs. The local authority, in reply, stated that they should treat any proceedings under the reference contemplated by B. as being nugatory and void:—*Held*, that this state of affairs constituted a dispute as to the amount of damage, and not as to the liability of the local authority to make any compensation, and hence was the proper subject of a reference to arbitration under sect. 144 of the Public Health

Act, 1848: *In re Bradby* or *Bradley and Southampton Local Board* (1855), 24 L. J. Q. B. 239; 4 El. & Bl. 1014.

(4) "The question alone of the amount of compensation under the 68th section of the Lands Clauses Act had been referred by Mr. Byles [the claimant], and constructively by the commissioners, from their omission to appoint another arbitrator under the 25th section. He had jurisdiction to determine the amount of the damage done to Mr. Byles' quay and lands by the construction of the works by the commissioners in the execution of the powers given by the Acts, but not the jurisdiction to decide whether the commissioners were excused from the obligation to pay him by any collateral matter": *per* Parke, B., in *In re Byles and Ipswich Dock Commissioners* (1855), 11 Ex. at p. 473.

(5) By sect. 144 of the Public Health Act, 1848 (repealed by 38 & 39 Vict. c. 55, s. 343), it was provided that compensation should be made out of the rates levied under the Act to all persons sustaining damage by the exercise of the powers of the Act, and that disputes as to the amount of compensation should be determined by arbitration. By sect. 123 of the same Act arbitrators were to be appointed in case of "disputes as to the amount of any compensation to be made":—*Held*, that only disputes as to the amount of compensation, not disputes as to liability, were to be determined by arbitration: *R. v. Burslem Local Board* (1859), 1 El. & El. 1077.

(6) The award of arbitrators or an umpire upon a claim for compensation for lands injuriously affected by the works of a company under the Lands Clauses Act, like the assessment of a compensation jury, merely ascertains the amount, not the claimant's right to compensation: *Newbold and the Metropolitan Ry., In re* (1863), 14 C. B. N. S. 405.

(7) "What the arbitrator had to do is this: he had to take the notice in his hand, and to take from that notice what the rights of the claimants were—I mean the rights in point of title to the property, and term in property, and so forth; and, taking the notice in his hand, what he ought to have done was to take into consideration the surrounding circumstances, such as the situation of the land, the slope, . . . and, if you like, such a circumstance as this—that the damage had been done in 1864, and that there had been no claim made until 1867. All these were legitimate circumstances; but when he took into consideration, as he obviously has, according to his first reason, the covenant on the part of the lessor to construct a railway, and the right of the lessor to take back to himself whatever surface any other railway might take, he mistook, I think, the subject-matter of the reference to him. What was referred to him was to ascertain what damage had been sustained by those parties claiming to have an absolute right in this term. Now, the subject-matter upon which he awarded was not an absolute right in this term; but it was a right subject to a lessor's right to take away a portion of that land. . . . This was not referred to him at all": *per* Giffard, V.-C., in *In re Rhys and Dare Valley Ry.* (1868), L. R. 6 Eq. at p. 435.

(8) "The objection raised is that, under the 68th section of the Act, the arbitrator has to decide the amount to be paid if there is liability. And the 'if' is in the section, and not in the award. The arbitrator ought to say: 'Assuming the party is liable, I award the sum to be such.' Then it is said that the award is bad because he does not say that in his award. But that is mere form, and not an excess of jurisdiction. The point referred to him is the amount": *per* Jessel, M.R., in *Harper v. Great Eastern Ry.* (1875), 44 L. J. Ch. at p. 510.

(9) Lord Fitzgerald said: "It is difficult to see how the arbitrator can avoid inquiring whether the acts complained of were matters done in the exercise of the powers of the Act, and as to which the claimant was not in default, so as to limit the scope of his assessment of compensation; but his decision, if any, as to the liability of the defendants

in point of law would not be binding, and would be inoperative": *Brierley Hill Local Board v. Pearsall* (1884), 9 App. Cas. 595.

NOTE.—Where a notice to treat contained the following proviso as to title—"So far as such estate and interest is an estate or interest for which you are entitled to purchase-money or compensation other than such as may be payable under any other notice to treat in respect of the same lands":—*Held*, that the company could not in consequence revoke the reference to arbitration: the effect was to reserve the matter for future decision: *In re Chilworth Gunpowder Co. and the Manchester Ship Canal* (1891), 8 T. L. R. 79.

(ii.) Commissioners.

Illustration.

By a canal Act commissioners were appointed for "settling, determining and adjusting" all questions, matters and differences between the company and the owners of lands prejudiced by the execution of any of the powers thereby granted; and, by a subsequent section, the amount of compensation was to be assessed by a jury, and the commissioners were to give judgment for the sum so assessed, which was to be "binding and conclusive to all intents and purposes":—*Held*, that the verdict and judgment were conclusive as to the amount, but not as to the claimant's right to compensation: *Barber v. Nottingham and Grantham Ry. and Canal* (1864), 15 C. B. N. S. 726.

(iii.) Jury.

Illustrations.

(1) Where a company was not compellable to purchase any part of a dwelling-house, &c., which was beyond fifty feet from the proposed railway, and, at an inquisition held before a sheriff and a jury, it appeared in evidence that part of the house was beyond the fifty feet limit, and the sheriff, on that ground, refused to hear further evidence or to proceed with the inquiry, and directed the jury to find that the claimant was not entitled to have his property purchased by the company—upon motion for a *mandamus* to the sheriff to execute the precept:—*Held*, that the precept, although improperly raising as a question for the jury the fact of the house being within the limit (without which they had no jurisdiction to inquire), was sufficient, and the Court issued the *mandamus*: *Walker v. London and Blackwall Ry.* (1842), 3 Rail. Cas. 396.

(2) "It seems to have been doubted whether, by issuing the precept, the company would not be taken to admit the existence of a right to some compensation; but I cannot see any ground for that conclusion. If the Legislature has made it the duty of the company to issue the precept upon being required to do so, at the serious peril of paying the full amount of the claim in the event of the claimant being found entitled, the performance of that imperative duty cannot operate as an admission on the part of the company. After the compensation jury shall have decided that the claimant has sustained a damage for which he was entitled to recover compensation, the claimant has to enforce judgment. Formerly the proceeding for that purpose was by *mandamus*, and if the jury had no jurisdiction to decide upon the right, it follows that the question of right might be raised by a return to the *mandamus*: but since the decisions of *Corrigall v. London and Blackwall Ry.* (1843), 5 Man. & G. 219, and *Williams v. Jones* (1845), 13 M. & W. 628, it seems that the remedy of the claimant is by action upon the judgment; and the pleadings in *Corrigall v. London and Blackwall Ry.* in such an action show that the right might be wholly disputed, supposing, as before stated, a compensation jury had no jurisdiction to decide the question": *per* Lord Truro, C., in *East and West India Docks Ry. v. Gattke* (1851), 3 Mac. & G. at p. 170.

(3) Notice was given by D. to a company that they had, by their works, obstructed a way to which D. was entitled as appurtenant to a messuage belonging to D., and requiring

the company, in default of paying a sum named, to summon a jury to assess compensation. The company issued such warrant, reciting the notice and refusing to admit either D.'s right of way, the damage, or the injurious affection. At the inquiry evidence was given of the existence of the right, although D. insisted that the existence of the right was to be taken for granted at the inquiry, and that it had been proved. This was disputed by the company. The sheriff told the jury to say whether or not the right of way existed. Upon the application of D. the Court *quashed* the inquisition verdict and judgment, holding that, under sect. 68 of the Lands Clauses Act, the jury had no power to inquire into the right of D. to the way, but were bound to assess compensation upon the assumption that it existed: *R. v. London and North-Western Ry.* (1854), 3 El. & Bl. 443. "It is admitted that the sheriff's jury cannot conclusively determine the question of title; that in itself is an argument against their entering upon it at all, on the ground of delay and expense. It must be admitted also that, even for a preliminary and inconclusive trial, they are an unsatisfactory tribunal, and their decision additionally objectionable, because no error in the direction given to them, nor any mistake or even perverseness in their finding can be reviewed, as in a trial at *Nisi Prius*": *per* Coleridge, J., at p. 475, *ib.*

(4) "It is clear that if it [the claim] went before a jury, or, I think, before an arbitrator, without any agreement between the parties, but they had gone on at arm's length to have the value assessed, and the claimant had said, 'I claim a lease for fifty years,' I apprehend that, according to the authorities, the jury would have no power to do more than to assess the value of the interest so claimed; they would have no jurisdiction to try whether the claimant had such an interest as that which he claimed to have": *per* Kindersley, V.-C., in *Brandon v. Brandon* (1864), 34 L. J. Ch. at p. 336.

(iv.) Justices.

Illustration.

"As regards sects. 22 and 24 of the Lands Clauses Act, 1845, it seems to me to be clear that all that the justices are to do is to decide what is the amount of compensation which is to be paid, and that the question of title to receive the compensation is still left undecided, and that the justices have no jurisdiction at all as to the title. The reason that a question as to title in such a proceeding does not oust the jurisdiction of the justices is that their jurisdiction is to decide only what amount of compensation is to be paid to the claimant, provided he has a right to receive any compensation at all, so that the question of title is still left completely open": *per* Bowen, L.J., in *R. v. Edwards* (1884), 13 Q. B. D. at p. 594.

VIII. The question of the company's liability is properly raised in an action on the award or other finding, and not before the arbitrator or jury which assesses the quantum of compensation.

Illustrations.

(1) The defendants, acting under their statutory powers, caused a large excavation to be made for the purposes of their railway, under a public highway. H. was the occupier of a house near the railway, and, owing to the excavation so made by the railway, a portion of H.'s building collapsed from want of support. H. having claimed compensation, an inquisition was duly held, at which the sheriff directed the jury, as a matter of law, that H. had not sustained any damage, the collapse of the building having been the result of H.'s own act. The Court *quashed* the inquisition; and it was pointed out by Wightman, J. (following *Read v. Victoria Station and Pimlico Ry.*, 32 L. J. Ex. 167), that it was open to the defendants to raise the question of their liability, in law, by proper pleading in the action on the judgment: *R. v. Metropolitan Ry.* (1863), 32 L. J. Q. B. 367; *S.C., sub nom. Horrocks v. Metropolitan Ry.*, 4 B. & S. 315.

(2) The B. Local Board made alterations in the level of the street in front of P.'s premises. P. appointed an arbitrator under sects. 179 and 180 of the Public Health Act, 1875, and gave notice to the board, who denied their liability and did not appoint an arbitrator, but attended the arbitration under protest and denied liability. The arbitrator made his award. P. sued on the award :—*Held*, that the arbitrator had jurisdiction to hold the inquiry and make his award, and that the proper manner for the local board to dispute their liability was by way of defence to the action on the award : *Brierley Hill Local Board v. Pearsall* (1884), 9 App. Cas. 595.

IX. Mandamus to justices to hear and determine.

See sect. 21, *ante*.

Compensation exceeding 50*l.* to be settled by Arbitration or Jury, at the Option of the Party claiming Compensation.

23. If the Compensation claimed or offered in any such Case shall exceed Fifty Pounds, and if the Party claiming Compensation desire to have the same settled by Arbitration, and signify such Desire by Notice in Writing to the Promoters of the Undertaking, before they have issued their Warrant to the Sheriff to summon a Jury in respect of such Lands, under the Provisions herein-after contained, stating in such Notice the Nature of the Interest in respect of which such Party claims Compensation, and the Amount of the Compensation so claimed, the same shall be so settled accordingly; but unless the Party claiming Compensation shall as aforesaid signify his Desire to have the Question of such Compensation settled by Arbitration, or if when the Matter shall have been referred to Arbitration the Arbitrators or their Umpire shall for Three Months have failed to make their or his Award, or if no final Award shall be made, the Question of such Compensation shall be settled by the Verdict of a Jury, as herein-after provided.

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I. Who is entitled to give notice.

Illustration.

"This section (23) confers upon a person claiming compensation the right to choose between arbitrators and a jury as the tribunal which shall determine the amount of compensation to which he is entitled. The words of the section show that this option is not exercisable by the promoters, but only by the claimant: it is he who 'has the power to decide whether there shall be an arbitration or not': *per* Blackburn, J., in *In re Fitzhardinge (Lord) and Gloucester and Berkeley Canal* (1872), L. R. 7 Q. B. 776.

II. Form and contents of notice.

(1.) The notice must be in writing.

Illustration.

M.'s lands being injuriously affected by a railway company, A. applied verbally to the arbitrator sitting at N. to assess compensation. The arbitrator refused compensation, on the ground that none of M.'s lands were taken. On an application for a *mandamus*, it was argued that, although the ground of refusal was erroneous, yet that the *mandamus* ought not to go, as there was no claim in writing for compensation, as required by the Act:—*Held*, that the arbitrator was not precluded from raising this objection then; and *held also* that the objection was decisive against M.'s right to a *mandamus*: *R. v. Fishbourne* (1864), 17 Ir. C. L. R. 148.

(2.) Meaning of "particulars."

Illustration.

The word "particulars" means "such particulars as would enable the company to ascertain the true value of the lands and so offer the party interested compensation accordingly": *per* Cockburn, C.J., in *Healey v. Thames Valley Ry.* (1864), 5 B. & S. at p. 778.

(3.) If a claimant decides to deliver particulars he must state the *quantum* of his interest with sufficient particularity.

Illustrations.

(1) The following notice was *held* bad for want of description of interest:—"We, the undersigned T. L., R. H. and R. H., do hereby give you notice that as trustees named and

appointed in and by &c., we have and claim an *estate and interest in certain copyhold lands and hereditaments* situate in &c., required to be purchased &c., and that we do claim compensation for the said lands and hereditaments &c.": *In re North Staffordshire Ry. and Landor* (1848), 17 L. J. Ex. 350.

(2) The following notice, in which the plaintiff described himself merely as "occupier" of a certain building, was *held* sufficient:—"I, C. C., do hereby give you notice that I am the occupier of a dwelling-house, bakehouse and shop situate &c., and which said premises are used by me for carrying on therein my business as a baker and that you have during and in consequence of the construction of the railway called &c., injuriously affected my said dwelling-house, bakehouse and shop, and occasioned loss and damage to me in my business, by the blocking up the [public] passage &c., and thereby preventing the passing of customers to my said bakehouse and shop and causing a great diminution in my business; and I give you notice that I claim 300*l.* &c." The plaintiff was not bound to give a precise description of his legal interest: *Cameron v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430.

(3) "As to the case which has been so much pressed upon our attention (*Cameron v. Charing Cross Ry.*), I do not at all quarrel with the judgment of the Court of Common Pleas. Perhaps there may be language occurring in the judgments which would not have been used by the learned judges if they had had the present case before them. But, fully concurring in the decision of that case, upon the ground that all that should be stated as being the interest of an *occupier*, the obstruction having been temporary and not permanent, and therefore it being clearly unnecessary, in order to guide the company, that the claimant should state whether he was the occupier for the time or for any longer term, fully concurring in the propriety of the decision, I cannot go the length of saying, as it is contended for the plaintiff, that the language of the learned judges applies to the case now before us. I think that the true construction to be put on the language of the 68th section is that it requires the same statement of particulars as would have been required under the 18th section, and that it being agreed upon all hands that under the 18th section, the present statement would not be sufficient, the company are right in their contention": *per* Cockburn, C.J., in *Healey v. Thames Valley Ry.* (1864), 34 L. J. Q. B. at p. 56. Where the claimant is occupier under a lease for years, it is not enough to state in the notice that he "holds under a lease," *ib.*

(4) W. agreed (in writing) to let to K. certain premises at a yearly rental of 36*l.*, payable quarterly; and not to raise the rent or give K. notice to quit so long as he paid the rent as it fell due. W., who had only a leasehold interest expiring in 1881, also agreed (verbally) with K. to let him remain in the premises for such term (not exceeding W.'s term) as K. might desire to continue tenant. A railway company contracted to purchase K.'s interest, which he described as "held for any term at tenant's option, but not beyond the term and interest of W., whose term will expire in 1881." The company disputed K.'s title to the interest described and paid the purchase-money into court:—*Held*, that the relation of landlord and tenant made K. a purchaser for valuable consideration to the extent of W.'s lease; that he was not a mere tenant from year to year, but had a right to retain possession to the extent of his landlord's interest, and that he was entitled to the purchase-money: *In re King, Ex parte East London Ry.* (1873), L. R. 16 Eq. 521.

(5) L. claimed as mortgagee in possession of premises alleged by her to be injuriously affected by the defendant company's works. An award was made in favour of L., who brought her action upon it, when judgment was given for the company on the ground that, as the greater part of the premises was underlet, and the tenants were paying rent to L., she was not mortgagee in possession, but had only a reversionary interest in the premises:—*Held*, that the company had waived any objection that they might properly have made to the description of L.'s interest by going on with the arbitration. The claim might, in the circumstances, have been disregarded by the company: *Lovering v. City of London and Southwark Subway* (1891), 7 T. L. R. 600.

- (4.) The amount of compensation claimed must be a sum certain.

Illustrations.

(1) Where a claim for compensation included (*inter alia*) "70*l.* as the yearly and permanent damages during the remaining years" of the claimant's lease, and notice was given to have the amount assessed by a jury, which the promoters ignored, and an action was therefore begun to recover the amount, it was held that the pursuer (plaintiff) was bound to state his claim in such a way that the full amount could be forthwith paid, and that he could not claim a series of annual payments during the remainder of his lease : *Falconer v. Aberdeen Ry.* (1853), 15 Ct. Sess. Cas. (2nd series) 352.

(2) "The object of requiring a plaintiff to state the amount of compensation which he claims, I think, must be that the promoters may have an opportunity of considering whether they will pay him the amount he claims without any arbitration, or whether they will offer him a smaller sum. I think, looking at the 23rd section, that it is clear enough that the Legislature contemplated that an offer might be made after notice had been given by the claimant of his desire to have an arbitration" : *per* Blackburn, J., in *Fitzhardinge (Lord) and Gloucester and Berkeley Canal* (1872), 41 L. J. Q. B. at p. 319.

III. The provisions of sect. 23 as to the time for making the award, &c., apply to arbitrations under sect. 68 in respect of claims for damage to lands taken or injuriously affected.

Illustration.

A railway company injuriously affected lands of O. by works done under the powers of their Act. O. gave notice to have his claim settled by arbitration, and, the company not having done anything, he formally appointed F. arbitrator for both. F. made his award, but more than three months after his appointment :—*Held*, that O. was entitled to have the claim settled by arbitration in manner provided by sect. 68 ; but *held also* that sect. 63 applies as well to arbitrations under sect. 68 for claims for damage to lands taken as to arbitration for claims for lands intended to be taken, and consequently that the award was out of time : *Evans v. Lancashire and Yorkshire Ry.* (1853), 1 El. & Bl. 754.

IV. Where there is a dispute as to liability.

(a) A claimant, although he really may have no title, cannot be restrained by injunction from claiming compensation.

Illustration.

A railway company obtained an Act empowering them (*inter alia*) to run steam vessels as a ferry, subject to a provision that they should make compensation to the P. Ferry Co. for any loss, damage or injury occasioned by the establishment of a new ferry. Some years before the passing of this Act the P. Company had demised the ferry to the B. F. Society for a term. The lessees claimed compensation (in one lump sum), from the railway company on behalf of themselves and their lessors, and required the compensation to be ascertained by arbitration. The lessors had not authorised the use of their names, and the Act made no mention of the lessees. The railway company having brought an action for an injunction to restrain the lessees from proceeding to arbitration under the notice :—

Held that, although the Court in which an action is brought has jurisdiction to stay proceedings in it if it has been brought without authority, the Court has no general jurisdiction to restrain persons from acting without authority, and that an injunction could not be granted to restrain a person from taking proceedings out of court in the name of a person who had given no authority to use it : *London and Blackwall Ry. v. Cross* (1886), 31 Ch. D. 354.

(b) Similarly the promoters cannot generally be restrained by injunction from summoning a jury to assess compensation on the ground that they have no authority to take the land in question.

Illustration.

A railway company, under the powers of their Act, purchased a subsisting lease in lands, and they gave notice to the plaintiff, the owner of the reversion in fee, for summoning a jury to assess the value of the fee simple thereof. The plaintiff filed his bill insisting that the company were not authorised by their Act to take more than a certain part of the land, and praying an injunction to restrain them from proceeding to assess the value of the excess beyond that portion :—*Held*, that inasmuch as the contemplated proceedings would, if the company were not authorised by their Act to take the land in question, be a nullity, and inasmuch as the entry and possession of the company as derivative lessees were lawful, and no case was made of any sudden grievous injury done to the inheritance, the motion for the injunction must be refused with costs : *Mouchet v. Great Western Ry.* (1838), 1 Rail. Cas. 567.

V. Where arbitration proceedings fail.

(a) When arbitration proceedings fail, the claimant becomes entitled to have a jury summoned; and if the promoters refuse to issue their warrant for a jury, they may be compelled, by writ of *mandamus*, to proceed (*see* sect. 21, *ante*).

(b) If the jury have exceeded their jurisdiction, the proper remedy is by way of a writ of *certiorari* to quash the proceedings (*see post*, sect. 145, *certiorari*).

VI. The provisions of sect. 23 are not obligatory if the parties have agreed upon an alternative arrangement.

Illustration.

A landowner having claimed compensation from a railway company for property taken, a statutory arbitration (before two arbitrators and an umpire) was begun under the provisions of sect. 23 of the Lands Clauses Act. Afterwards, owing to the death of the umpire before award made, the parties agreed to submit the claim to a single arbitrator, by whom an amount exceeding that of the original offer was awarded :—*Held*, that the landowner was entitled to have all the taxed costs from the initiation of the arbitration; that the substitution by agreement of a sole arbitrator was a continuation of the original arbitration; and that the provision of sect. 23 as to a jury in default of an award by the umpire was not obligatory if the parties had agreed to an alternative arrangement : *R. v. Manley Smith* (1893), 63 L. J. Q. B. 171.

VII. The owner of property taken by the promoters does not lose his right to have the value assessed by a jury under sect. 23 because he has made no claim and because the promoters have proceeded under sect. 85.

NOTE.—The above rule is taken from the head-note to *R. v. Metropolitan Ry.* (1865), 13 L. T. 444, but the case is difficult to understand owing to the confused and imperfect statement of the facts.

Method of
proceeding for
settling Disputes
as to Compensation
by Justices.

24. It shall be lawful for any Justice, upon the Application of either Party with respect to any Question of disputed Compensation by this or the Special Act, or any Act incorporated therewith, authorized to be settled by Two Justices, to summon the other Party to appear before Two Justices, at a Time and Place to be named in the Summons, and upon the Appearance of such Parties, or, in the Absence of any of them, upon Proof of due Service of the Summons, it shall be lawful for such Justices to hear and determine such Question, and for that Purpose to examine such Parties or any of them, and their Witnesses, upon Oath, and the Costs of every such Inquiry shall be in the Discretion of such Justices, and they shall settle the Amount thereof.

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I. Territorial limits of justices' functions.

Illustration.

The magisterial functions of justices are confined to the county or borough, &c., for which their commissions are respectively issued ; but mere ministerial duties, such, *e.g.*, as

administering the oath for an affidavit, may be performed anywhere within the United Kingdom, for the "power exercised is one personally inherent" in the justice: *per* Lord Cranworth, C., in *Kerr v. Ailsa (Marquess)* (1854), 1 Macq. H. L. 736.

II. Disqualification of justices.

(i.) Pecuniary interest disqualifies a justice from acting.

Illustrations.

(1) Justices made an order directing the surveyor of highways to pay to turnpike trustees a sum of money to be laid out in repairs of the turnpike road. Another justice had money owing to him on the security of the tolls:—*Held*, that all these justices were disqualified from sitting on an appeal against the order: *R. v. Hertfordshire Justices* (1845), 6 Q. B. 753.

(2) The defendants, who were justices of the peace, and also shareholders in the N. E. Railway Co., convicted A. of travelling upon the railway in an illegal manner:—*Held*, by Blackburn, J., that the fact of their being shareholders, however slight their interest might be, disqualified them from acting: *R. v. Hammond* (1863), 9 L. T. 423.

(3) A justice was a ratepayer objecting to a valuation list:—*Held*, that he was so interested as to be disqualified in sitting on the hearing of other appeals from the valuation: *R. v. Yarmouth Justices* (1882), 30 W. R. 460.

(4) By the presentment of a jury at a court of sewers it was found that W., as the owner of C. Farm, had from time immemorial used and was by reason of his tenure liable to repair at his own costs certain walling so as to prevent the influx of the waters from the rivers and creeks surrounding and near to the levels. Orders were made upon W. by the commissioners of sewers in 1881 and 1882. One of these commissioners had a personal interest as owner of lands within the levels:—*Held*, that if the commissioners had made the orders under the powers of sect. 33 of the Land Drainage Act, 1861, they must themselves have found, as a fact, W.'s liability; that in exercising such a jurisdiction they would have been acting judicially, and that the orders made would then have been invalidated by the personal interest of one of the commissioners: *Fobbing Commissioners v. Reg.* (1886), 11 App. Cas. 449.

(5) "In the first place, it is a leading principle of English law that no one is allowed to be a judge in his own case; that means that the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. . . . But the law does not stop there, for there may be an interest which has substantially the same effect as a pecuniary interest, though it is not of the same nature. This is explained in the case of *R. v. Rand* (1866), L. R. 1 Q. B. 230, where Blackburn, J., delivering the judgment of the Court of Queen's Bench, said, 'Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that, where there is a real bias of this sort, this Court would not interfere': *per* Stephen, J., in *R. v. Farrant* (1887), 20 Q. B. D. at p. 61.

(ii.) The interest of the justice, in order to disqualify him from acting, must not be too remote or contingent.

Illustrations.

(1) A municipal corporation obtained powers to acquire the waterworks of the town, and were authorised to take the water of a certain stream, without the assent of the

mill-owners on that beck, upon obtaining the certificate of justices that a certain reservoir had been completed, was of a given capacity, and full of water. An application, which was opposed, was in due course made to the justices, who, after an elaborate hearing, granted it. Two of the justices who adjudicated were trustees of the local hospital and of a friendly society, part of whose funds had been invested in bonds of the corporation, charged upon the borough fund. These bonds were taken in the names of the trustees, and one justice was a trustee of the hospital, the other of the society. Neither of them had, or could have, any pecuniary beneficial interest in the bonds, but the security would benefit by anything which improved the borough funds :—*Held*, that there was nothing in the facts to disqualify the justices ; and a *certiorari* to bring up the certificate was refused : *R. v. Rand* (1866), L. R. 1 Q. B. 230.

(2) A railway company was authorised to construct a new line, and, to that end, required certain land belonging to S. The matter of compensation was referred to a jury to assess. Before this question could be decided, however, another railway company, in which the sheriff was a shareholder, became interested, under an executory agreement, in the undertaking :—*Held*, that the sheriff was not so interested as to disqualify him from acting : *R. v. Manchester, Sheffield and Lincolnshire Ry.* (1867), L. R. 2 Q. B. 336.

(3) K., an officer of a corporation, whose duty it was to collect the borough rate, applied for a summons against those who were in arrears as to their rates. In so doing he used his own discretion, and did not wait for instructions from the town council. K. obtained a summons from a justice who was not a member of the town council, but at the hearing of the summons the justices refused to adjudicate and dismissed the summons on the ground that one of the sitting justices was a town councillor : *Held*, that there was no ground in the case for supposing either interest or likelihood of bias, and therefore there was no disqualification : *R. v. Handsley* (1881), 8 Q. B. D. 383.

(4) F., who was a surgeon by profession and a justice of the peace, attended a patient for injury the result of an assault by B. F. endeavoured to dissuade his patient from prosecuting B., and conveyed to him a message from the brother of B. expressing regret and suggesting the forms of amends. A prosecution was afterwards begun, and with regard to it F. had expressed his opinion that it would not succeed. F. was subpoenaed to give evidence for the prosecution, and a prohibition was obtained to prevent his sitting as a justice at the hearing :—*Held*, that F.'s conduct did not show that he had such a substantial interest in the result as to make it probable that he would have a bias, and that the fact of his having been subpoenaed did not disqualify him from acting : *R. v. Farrant* (1887), 20 Q. B. D. 58.

(iii.) Real interest or bias, or a reasonable probability of bias, will disqualify a justice from acting.

Illustrations.

(1) An information was laid against H. under the Salmon Fishery Act for failing to remove within thirty-six hours of the beginning of the close season a certain apparatus for taking salmon. H. was the occupier of a mill on a river ; one of the three justices who heard the case was a riparian proprietor on the river above H.'s mill, and all three were members of the local Salmon Fishery Landowners' Association. The information was laid by the head-watcher paid by this association, and the prosecution was conducted by a solicitor who was honorary secretary and treasurer of the association. The justices convicted :—*Held* (upon application for a *certiorari*), that the conviction must be quashed, the justices having an interest, and being therefore incompetent to sit : *R. v. Allen* (1864), 33 L. J. M. C. 98.

(2) H. was the owner of a farm of 163 acres at Edmonton. On August 26th, 1870, H. agreed with the E. Local Board to receive, subject to certain conditions, the sewage of the

parish of E., intending to utilise it on his farm. Differences having arisen, H. turned the outflow of the sewage off his farm, the result of which was that the Lee Conservancy Board took proceedings against the E. Local Board. A conviction was obtained and a small fine imposed. After this H. again permitted the sewage to run on to his land and be there absorbed. Some time after, H. gave notice to the E. Local Board that he should decline, save under certain conditions, to take any more sewage on his farm, and, at a later date, turned it into the same channel as that in which it had run on the previous occasion. Thereupon the Lee Conservancy Board took out two summonses against H., one for making an opening into the intercepting drain, the other under a local Act. The summonses were heard before four justices, two of them being interested, one (M.) as chairman of the E. Local Board and the other as chairman of another local board, which was also interested in the proceedings. H. protested against their taking any part, but the two justices persisted, and the Bench convicted H. M. stated in his affidavit that he did not act, on this occasion, as chairman of the bench, nor use any influence as to the conviction:—*Held*, that M. had such an interest as might give him a real bias in the matter, and that therefore he ought not to have acted as justice, and that it was immaterial what part he took in the matter: *R. v. Meyer* (1875), 1 Q. B. D. 173.

(3) Notice was given to a local sanitary authority by the Local Government Board requiring them to abate a nuisance, and a summons was accordingly taken out against B., the person alleged to be responsible. At the hearing two of the justices who acted were also members of the local authority, and were present when the resolution against B. was passed:—*Held*, that there was a possibility of bias in the justices, who therefore ought not to have acted: *R. v. Milledge* (1879), 4 Q. B. D. 332.

(5) The sanitary committee of the town council (who were the local authority under the Public Health Act, 1875) passed a resolution directing the town clerk to prosecute S. for exposing for sale meat unfit for human consumption, contrary to the statute, and at the hearing, before four justices, S. was convicted. One of the justices was a member of the council and of the sanitary committee, and had been present at the meeting at which the above resolution had been passed:—*Held*, that sect. 258 of the Public Health Act has not the effect of enabling a person to act as prosecutor and judge in the same matter, and did not take away the disqualification which attached to the justice by reason of his having acted as a member of the sanitary committee in directing the prosecution, and that a *certiorari* to bring up and quash the conviction must go: *R. v. Lee* (1882), 9 Q. B. D. 394. "I am of opinion that sect. 258 has not the effect of enabling a person to act as prosecutor and judge in the same matter. It would require express terms in an Act of Parliament to produce that effect. . . . There is no warrant for holding that, where the justice has acted as a member by directing a prosecution for an offence under the Act, he is a sufficiently disinterested person as to be able to sit as a judge at the hearing of the information": *per* Field, J., at p. 395, *ib.*

(6) A complaint having been made against a vicar by a person who would not act as prosecutor, the bishop directed his secretary to act as promoter, and on the application of the secretary issued a commission to inquire into the allegations against the vicar. The commissioners reported a *prima facie* case, and the bishop proceeded:—*Held* that, the bishop not being the patron of the living held by the person complained against, the mere fact that he was, by his secretary, promoter of the suit did not, in the absence of any personal interest or bias, disentitle him from adjudicating upon the case": *R. v. St. Albans (Bishop)* (1882), 9 Q. B. D. 454.

(7) H., a justice of the peace and an *ex-officio* member of a board of guardians, took an active part in defending an appeal which a railway company brought against the decision of an assessment committee with respect to the rating of their property in the parish of W., and voted that the costs of the assessment committee in defending the appeal should be defrayed by his board of guardians. When the appeal came on to be

heard at quarter sessions H. mentioned that he was an *ex-officio* member of the board of guardians, and offered to retire from the bench, but did not mention that he had taken an active part in the proceedings connected with the rating of the railway company, or its appeal against the decision of the assessment committee, which was adverse to the company; and he was allowed to take part in the adjudication upon the understanding that he was a mere *ex-officio* guardian and had in no way interested himself in the subject-matter of the appeal. The quarter sessions affirmed the decision of the assessment committee:—*Held*, that the previous conduct of H. showed that he was, or was likely to be, swayed by a real bias in the matter, and that therefore the proceedings of the Court of Quarter Sessions were irregular, and their order ought to be quashed: *R. v. Cumberland Justices* (1888), 58 L. T. 491. “The rule of law is that where a magistrate takes such an interest in the subject-matter of the litigation as to make a real bias reasonably probable he is disqualified from sitting as a magistrate”: *per* Mathew, J., at p. 493.

(8) “It was contended that the magistrates were biased in their decision. There are, I think, no facts to support that contention. It is admitted that they had no pecuniary interest in the matter; but it is said that they were disqualified on the ground of bias because three of their number owned shares in shipping companies, which were insured in an association, which was a member of the Shipping Federation, of which the informant was an official. If it could have been shown that these magistrates were, by themselves or their agents, the real prosecutors in the case, it would be very different; but I cannot think that, under the circumstances, there was any bias, or likelihood of bias, on their part”: *per* Collins, J., in *R. v. McKenzie*, [1892] 2 Q. B. at p. 522.

(9) S. was required by resolution of a vestry meeting to take away a heap of rubbish from alongside a highway. This resolution was moved by one G., who was a justice of the peace and a ratepayer. S. having failed to comply, a summons was issued against him for depositing the heap and for failing to remove it. G., the justice, adjudicated upon the case, together with another justice, and made an order directing the heap to be removed and sold, and the proceeds of the sale to be applied to the repair of the highway:—*Held*, that the justice was disqualified from adjudicating upon the summons, for the part taken by him in moving the resolution put him in the position of acting as accuser and judge, and afforded ground for a reasonable suspicion of bias on his part, although there might have been no bias as a fact, and upon the further ground that as a ratepayer he had a pecuniary interest in the result of the case: *R. v. Gaisford*, [1892] 1 Q. B. 381.

(10) At a meeting of a board of conservators of a salmon fishery district, one L., who was one of the conservators and also a justice of the peace, was present, and a resolution was carried unanimously for the prosecution of S. for fishing contrary to the provisions of the Salmon Fishery Acts. L. did not either move or second the resolution. At the hearing of the case against S. before a number of justices L. was present, and S. was convicted. No protest was made against the conduct of L.:—*Held*, that sect. 61 of the Salmon Fishery Act, 1865, does not operate to remove the disqualification of the justice by reason of his having taken part as a member of the board in directing the prosecution, and that *certiorari* must go to quash the conviction: *R. v. Henley*, [1892] 1 Q. B. 504. “All sect. 61 does is to provide that a justice shall not be disqualified from acting as a justice merely by reason of the fact that he is a member of a board of conservators: it does not authorise him to take part as a member of the board in directing a prosecution to be instituted against a particular individual, and afterwards to act as a justice and hear and determine the very prosecution that he (with others) has already ordered to be instituted”: *per* Lawrance, J., at p. 506, *ib.*

(11) The L. County Council delegated to a committee of their body the hearing of applications for music and dancing licences. The committee, by a majority, recommended that

a licence which had been applied for should not be granted. The applicant thereupon applied to the county council for a licence. At the hearing before the council certain members of that body, who were also members of the committee and had voted in the majority against granting a licence at the hearing before the committee, instructed counsel to represent them before the council and oppose the application for a licence. The council, by a majority, refused the application for a licence. Three of the members who were represented by counsel were present in the council chamber, but none of them voted on the division :—*Held*, that the presence at the hearing of those members of the county council who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a *mandamus* to hear and determine the application according to law was made absolute : *R. v. London County Council, In re Akkersdyk*, [1892] 1 Q. B. 190.

(12) A summons was taken out under sect. 361 of the Merchant Shipping Act, 1854, against an unqualified pilot for continuing in charge of a ship within a pilotage district after a qualified pilot had offered to take charge of her. At the hearing (which resulted in the conviction of the defendant) one of the justices who took part in the adjudication was a duly licensed pilot for the district in question :—*Held*, that by reason of his membership of the class in whose interest the proceedings were taken, he was disqualified from acting, even though by reason of the peculiar nature of his employment as a pilot he was not brought into competition with unqualified pilots, and had consequently no personal interest in the conviction : *R. v. Huggins*, [1895] 1 Q. B. 563.

(13) Objections were taken to two justices—to one on the ground that he had taken part, as an alderman, in the business of acquiring for improvement purposes a licensed house, the licence becoming “merged” in that of other licensed premises, if the licence of the latter were granted. The objection to the other justice was that he was the owner of the land upon which a house (to be licensed) was to be built at the time when the first application for a licence was made, but afterwards conveyed away his interest :—*Held*, that no reasonable objection could be made in either case : *R. v. Stockport Justices* (1896), 60 J. P. 552.

NOTE.—This case was over-ruled in *R. v. Sunderland Justices* (*infra*).

(14) The Corporation of S. purchased licensed premises for the purpose of a street improvement. The corporation agreed under seal with D., a brewer—(1) that if D.’s application for a licence for the P. Hotel was granted he should pay 10,000*l.* to the corporation ; (2) that the corporation should on this payment close their licensed premises and surrender the licence ; (3) that if the licence of the P. Hotel should be revoked by the High Court, the corporation should repay the 10,000*l.* Certain members of the corporation who had taken an active part in making this agreement were justices and members of the licensing committee, and of the confirming body, and sat when the licence for the P. Hotel was granted and confirmed :—*Held*, that there was a danger and a likelihood of bias on the part of these justices, and that *certiorari* must go to bring up and quash the licence : *R. v. Sunderland Justices*, [1901] 2 K. B. 357.

(iv.). The mere fact of the service of a subpoena on a justice to give evidence in a particular case will not disqualify him from adjudicating in that case.

Illustration.

“Then it has been argued that the mere service of a subpoena on a magistrate is enough to prevent him from sitting as a magistrate. If that be so, a disqualification might always be created against a magistrate or judge, and that without alleging

the smallest charge of interest or favour against him, but merely because he had been served with a subpoena": *per* Grove, J., in *R. v. Tooke* (1884), 32 W. R. at p. 754.

(v.) A justice's disqualification may be waived (see also *post*, p. 256).

Illustrations.

(1) A surveyor directed trestles to be placed at intervals along a road on which fresh granite had been laid to confine the traffic within certain limits. H. drove his carriage against the trestles to knock them down, in alleged assertion of a right, he deeming the surveyor to have no power to place the trestles for this purpose. H. was convicted and fined 1s. for wilful damage. By a local Act the justices were made vestrymen, and became interested in the ownership of the trestles and also in the fine :—*Held*, (1) that the justices had jurisdiction to convict; (2) that, to obtain a *certiorari* to quash the conviction on the ground of the justices being interested, the party should show on the face of his affidavits that neither he nor his advocate, before the justices, knew of the objection at the time of the hearing :—*R. v. Richmond Justices* (1860), 8 Cox, C. C. 314.

(2) The W. Local Board laid an information before a justice who granted a summons, which was heard before Colonel S. and another justice. Objection was taken to Colonel S. on the ground that he had an interest as being a proprietor in the A. and C. Navigation Co. and therefore a ratepayer in the district. This objection was, however, abandoned, but revived at a later stage on another summons :—*Held*, that although Colonel S. might have been interested so as to incapacitate him from acting, yet, as the parties were aware of the objection and waived it, he had jurisdiction to make an order : *Wakefield Local Board v. West Riding and Grimsby Ry.* (1865), L. R. 1 Q. B. 84.

(3) B., a justice whose wife was tenant for life of a small public-house without accommodation for guests, sat as a licensing justice on an application by W. for a licence for a new hotel. The licence being refused, W. applied for a *mandamus* to have the application reheard :—*Held*, that the proper course was to bring up the order on *certiorari* to be quashed, and that *mandamus* could not be granted; *held also*, that generally on an application for *certiorari* on the ground of interest there should be affidavits showing that the applicant and his solicitor did not know of the interest of the justice at the time of hearing : *R. v. Kent Justices* (1880), 44 J. P. 298.

(vi.) Disqualification of a justice or sheriff is a ground for quashing the inquisition, but not for an action for damages.

Illustration.

Where defendants, a railway company, directed their warrant to the sheriff to assess compensation for the plaintiff's lands proposed to be taken, knowing the under-sheriff to be interested, and the under-sheriff presided at the inquiry and the inquisition was therefore quashed, whereby the plaintiff alleged that he suffered damage :—*Held*, a bad count, on demurrer, inasmuch as the warrant was properly directed to the sheriff, and the improper conduct of the inquiry was not the act of the defendants : *Worsley v. South Decon Ry.* (1851), 16 Q. B. 539.

III. The expression "two justices" means two or more justices.

Illustration.

"It has never been supposed that where it is said in an enactment that a matter shall be determined by two justices, the proceeding is vitiated by there being more

than two present": *per* Lord Campbell, C.J., in *R. v. Rochdale Improvement Act Commissioners* (1856), 2 Jur. (N.S.) 861.

IV. Power of justices and its extent.

(a) Sect. 24 deals with the hearing before justices of any matter of which they have cognisance under the Lands Clauses Act—that is to say, under sects. 22, 98, 116, 119, 121, 124, and 125.

(b) It is submitted that justices, when acting under sect. 24, constitute a court of summary jurisdiction within the meaning of sect. 13, subsect. 11, of the Interpretation Act, 1889, which provides as follows:—"The expression 'court of summary jurisdiction' shall mean any justice or justices of the peace or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law."

NOTE.—There is some doubt upon the point whether justices, when acting under the Lands Clauses Act, are a court of summary jurisdiction within the above enactment having power to state a case for the opinion of the High Court. *Boulter v. Kent Justices*, [1897] A. C. 556, decided that justices at a licensing meeting are not such a court; in *R. v. Bird* (1898), 62 J. P. 309, it was decided that in the granting of a game-dealer's licence they are not a court of summary jurisdiction, and so had no power to state a case; in *re Bethel* (1899), 80 L. T. 492, was a decision to the same effect in regard to justices acting under sect. 299 of the Lunacy Act, 1890; in *Hagmaier v. Willesden Overseers* (1904), 20 T. L. R. 494, a similar decision was given with reference to justices sitting under sect. 10 of the County Juries Act, 1825, to revise the jury lists. It is submitted, however, that in these cases the functions of the justices were not in the same sense judicial as they are when the justices are determining the amount of compensation under the Lands Clauses Act. In *Great Northern and City Ry. v. Tillett*, [1902] 1 K. B. 874, a case was stated by justices in an application to them to determine the amount of compensation under sect. 121, and no point was taken that, not being a court of summary jurisdiction, they had no power to state a case. It should be noted, however, that some at least of the provisions of the Summary Jurisdiction Acts do not apply in the case of the determination of the amount of compensation under the Lands Clauses Act; thus sect. 11 of the Summary Jurisdiction Act, 1848, which requires that proceedings shall be initiated within six months from the time when the matter of complaint arose, has no application to the initiation of proceedings for the assessment by justices of the amount of compensation payable to a landowner in respect of his land (*see* this dealt with *infra*).

The 20th section of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), provides thus:—

"(1.) A case arising under this Act, or under any other Act, whether past or future, shall not be heard, tried, determined, or adjudged by a court of summary jurisdiction, except when sitting in open court.

“(2.) Open court means a petty sessional court-house or an occasional court-house.

“(4.) An occasional court-house means such police station or other place as is appointed (as hereinafter provided) to be used as an occasional court-house.

“(5.) The justices of a petty sessional division of a county shall from time to time, at a sessions of which notice has been given to every justice of such division, appoint police stations or other places other than the petty sessional court-house, to be used as occasional court-houses, at which cases may be heard, tried, determined and adjudged, and they may from time to time at such a sessions as aforesaid vary any police station or place so appointed, and shall cause public notice to be given in such manner as they think expedient of every police station or place for the time being appointed to be used as an occasional court-house.

“(7.) Where a case arising under this Act, or under any other Act, whether past or future, is heard, tried, determined and adjudged by a court of summary jurisdiction, sitting in an occasional court-house, the period of imprisonment imposed by the conviction or order of such court shall not exceed fourteen days, and the sum adjudged to be paid by the conviction or order of such court shall not exceed twenty shillings; and a justice of the peace when sitting alone in a petty sessional court-house shall not have power to impose any greater term of imprisonment or adjudge any larger sum to be paid than is above mentioned.

“(9.) Any case arising under this Act, other than such indictable offence as aforesaid, and any case arising under any future Act, which is triable by a court of summary jurisdiction, shall, unless it is otherwise prescribed, be heard, tried, determined and adjudged by a court of summary jurisdiction, consisting of two or more justices.

“(10.) The Lord Mayor of the city of London, and any alderman of the said city, and any metropolitan or borough police magistrate or other stipendiary magistrate, when sitting in a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace, shall, for the purposes of this Act, be deemed to be a court of summary jurisdiction consisting of two or more justices, and also to be a court of summary jurisdiction sitting in a petty sessional court-house, and is in this Act included in the expression ‘petty sessional court.’

“(11.) A court of summary jurisdiction, when not a petty sessional court, may, without prejudice to any other power of adjournment which the court may possess, adjourn the hearing of any case to the next

practicable sitting of a petty sessional court in the same manner in all respects as a justice is authorised to adjourn the hearing of a case under sect. 16 of the Summary Jurisdiction Act, 1848.”

NOTE.—The sub-sects. (3) and (6) are repealed by the Interpretation Act, 1889, and are replaced by sect. 13 (11), (12), (13) of that Act.

The 13th section of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), provides that:—

“(11.) The expression ‘court of summary jurisdiction’ shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law.

“(12.) The expression ‘petty sessional court’ shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the city of London, and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate, when sitting in a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

“(13.) The expression ‘petty sessional court-house’ shall, as respects England or Wales, mean a court-house or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute for such a court-house or place, and where the justices are accustomed to assemble at either special or petty sessions at more than one court-house or place in a petty sessional division, shall mean any such court-house or place. The expression shall also include any court-house or place at which the Lord Mayor of the city of London, or any alderman of that city, or any metropolitan or borough police magistrate or other stipendiary magistrate is authorised by law to do alone any act authorised to be done by more than one justice of the peace.”

Sect. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), provides—

“(1.) Any person aggrieved, who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the court to state a special case, setting

forth the facts of the case, and the grounds on which the proceeding is questioned, and if the court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated.

“(2.) The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in manner prescribed by rules of court made in pursuance of the Supreme Court of Judicature Act, 1875, and the Acts amending the same; and, subject as aforesaid, the Act of the Session of the 20th and 21st years of Her present Majesty, chapter 43, intituled ‘An Act to improve the administration of the law so far as respects summary proceedings before justices of the peace,’ shall, so far as it is applicable, apply to any special case stated under this section, as if it were stated under that Act;

“Provided that nothing in this section shall prejudice the statement of any special case under that Act.”

Sect. 41 of the Summary Jurisdiction Act, 1879, provides thus:—

“In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process or document required or authorised to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process or document, may be proved by a solemn declaration taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace or a registrar of a county court; and any declaration purporting to be so taken, shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same; and the fee, if any, for taking such declaration shall be such sum, not exceeding one shilling, as may be directed by rules made in pursuance of this Act, and any such fee shall be costs in the matter or proceeding to which it relates.

“The declaration may be in the form provided by a rule under this Act, and if any declaration made under this section is untrue in any material particular, the person wilfully making such false declaration shall be guilty of wilful and corrupt perjury.”

Sect. 4 of the Summary Jurisdiction (Process) Act, 1881, provides as follows:—

“Subject to the provisions of this Act, any process issued under the

Summary Jurisdiction Acts, may, if issued by a court of summary jurisdiction in England, and endorsed by a court of summary jurisdiction in Scotland, or issued by a court of summary jurisdiction in Scotland, and endorsed by a court of summary jurisdiction in England, be served and executed within the jurisdiction of the endorsing court in like manner as it may be served and executed within the jurisdiction of the issuing court, and that by an officer either of the issuing or of the endorsing court.

“ For the purposes of this Act,—

- “(1.) Any process may be issued and endorsed under the hand of any such person as is declared by this Act to be a court of summary jurisdiction, and may be endorsed upon proof alone of the handwriting of the person issuing it, and such proof may be either on oath or by such solemn declaration as is mentioned in sect. 41 of the Summary Jurisdiction Act, 1879, or by any like declaration taken in Scotland before a sheriff, justice of the peace, or other magistrate having the authority of a justice of the peace. Such indorsement may be in the form contained in the schedule to this Act annexed or in a form to the like effect :
- “(2.) Where any process requiring the appearance of a person to answer any information or complaint has been served in pursuance of this section, the court, before issuing a warrant for the apprehension of such person for failure so to appear, shall be satisfied on oath that there is sufficient *primâ facie* evidence in support of such information or complaint :
- “(3.) If the process is to procure the attendance of a witness, the court issuing the process shall be satisfied on oath of the probability that the evidence of such witness will be material and that the witness will not appear voluntarily without such process, and the witness shall not be subject to any liability for not obeying the process, unless a reasonable amount for his expenses has been paid or tendered to him :
- “(4.) This Act shall not apply to any process requiring the appearance of a person to answer a complaint if issued by an English court of summary jurisdiction for the recovery of a sum of money which is a civil debt within the meaning of the Summary Jurisdiction Act, 1879, or if issued by a Scotch court in a case which falls within the definition of ‘ civil jurisdiction ’ contained in the Summary Procedure Act, 1864.”

V. The application to justices to assess compensation need not be made within the period of six months limited by sect. 11 of the

Summary Jurisdiction Act, 1848, as the decision of the justices is not an "order" for the payment of money within sect. 1 of that Act.

Illustrations.

(1) Where notice to treat was served on March 14th and on March 21st M. sent in his claim, claiming as yearly tenant, but nothing further was done until October 30th following, when a summons was served upon M. to attend before a magistrate, so that the question of compensation might be settled, and it was objected that the application was too late, being more than six months after notice to treat:—*Held*, by Blackburn, Quain, and Archibald, JJ., that "there was no limitation of the period, for getting compensation settled, to six months": *R. v. Hannay* (1874), 44 L. J. M. C. 27.

(2) "It seems to me that the decision of the justices under sect. 24 of the Lands Clauses Act is not an order at all; for how can that be an order which neither expressly nor impliedly directs anything to be done, nor says that any consequences are to follow if a thing is not done? It is not in the popular sense of the term an order; and I can see nothing in the statute which makes it equivalent to an order": *per* Bowen, L.J., in *R. v. Edwards* (1884), 13 Q. B. D. at pp. 594, 595.

VI. The justices need not give their decision in writing.

Illustration.

"If this were an order I should be with you, but it is not. It was intended by sect. 121 to give a prompt and summary remedy in the case of tenants from year to year. The magistrate must determine the compensation, but I do not see how I can make him put his decision into writing": *per* Mellor, J., in *R. v. Boyce Combe* (1863), 32 L. J. M. C. at p. 68.

VII. The power to award "full compensation" carries with it that of granting the costs of the application, even where the special Act contains no specific provision as to costs.

Illustration.

Under a local improvement Act a municipal corporation had power to make sewers and convert drains into sewers, carrying them, if necessary, through and across underground cellars and vaults, making full compensation for any damage done. It was further provided that two justices should have power to determine such compensation, if no other means were provided:—*Held* that, although the Act contained no specific provision as to costs, full compensation of necessity included the costs of ascertaining the amount of the compensation; and therefore the justices had power to give the applicant his costs: *Huddersfield Corporation v. Shaw* (1890), 54 J. P. 724.

Appointment of Arbitrator when Questions are to be determined by Arbitration.

25. When any Question of disputed Compensation by this or the Special Act, or any Act incorporated therewith, authorized or required to be settled by Arbitration, shall have arisen, then, unless both Parties shall concur in the Appointment of a single Arbitrator, each Party, on the Request of the other Party, shall nominate and appoint an Arbitrator, to whom such Dispute shall be referred; and every Appointment of

an Arbitrator shall be made on the Part of the Promoters of the Undertaking under the Hands of the said Promoters or any Two of them, or of the Secretary or Clerk, and on the Part of any other Party under the hand of such Party, or if such Party be a Corporation aggregate under the Common Seal of such Corporation; and such Appointment shall be delivered to the Arbitrator, and shall be deemed a Submission to Arbitration on the Part of the Party by whom the same shall be made; and after any such Appointment shall have been made neither Party shall have power to revoke the same without the Consent of the other, nor shall the Death of either Party operate as a Revocation; and if for the Space of Fourteen Days after any such Dispute shall have arisen, and after a Request in Writing, in which shall be stated the Matter so required to be referred to Arbitration, shall have been served by the one Party on the other Party to appoint an Arbitrator, such last-mentioned Party fail to appoint such Arbitrator, then upon such failure the Party making the Request, and having himself appointed an Arbitrator, may appoint such Arbitrator to act on behalf of both Parties, and such Arbitrator may proceed to hear and determine the Matters which shall be in dispute, and in such Case the Award or Determination of such single Arbitrator shall be final.

NOTE.—In the following notes under this and the other sections of the Lands Clauses Act relating to arbitrations, only such cases are referred to as affect the Lands Clauses Act, and the application of the provisions of the Arbitration Act, 1889, to that Act. The general law of arbitrations is not within the province of this work; but decisions under the Common Law Procedure Act, 1854, where they relate to the Lands Clauses Act, are in many cases of great importance, because the provisions of that Act are more or less re-enacted in the Arbitration Act, 1889.

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I. Mode of procedure under the section.

Illustration.

“The section seems to us to enact, first, that an endeavour should be made by the parties to concur in choosing a single arbitrator ; and that, in the event of this failing, a request should be made by the one to the other that the latter should nominate an arbitrator ; that then each should make appointments in writing, and deliver them to their respective arbitrators, which are to be deemed the submission and irrevocable” : *per* Martin, B., in *Yates v. Blackburn Corporation* (1860), 6 H. & N. 61.

(a) The same implicit adherence to form as is necessary in compulsory arbitration is not required when the arbitration is by agreement.

Illustration.

When parties agree upon an arbitrator, and the secretary of the company (one party) signs the appointment of the arbitrator, an award made upon such submission is valid, although all the previous forms required by the statute have not been complied with. Such forms must be adhered to only in the case of compulsory arbitration : *Collins v. South Staffordshire Ry.* (1852), 7 Ex. 5. Pollock, C.B., said :—“There can be no necessity for a perfect compliance with all the statutory forms when both parties agree in the appointment of an arbitrator. The notices required by the Act can only be necessary where no option is exercised, and it is doubtful what the claimant may require” : at p. 16, *ib.*

(b) With regard to the application of the Arbitration Act, 1889, to matters arising under the Lands Clauses Acts, sect. 24 of the former Act provides as follows :—

“24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.”

That section has been construed in the following cases :—

Illustrations.

(1) “The Arbitration Act, 1889, in great measure follows the provisions of the Common Law Procedure Act, 1854 : if, therefore, any part of it is enacted in the same terms as those used in the Common Law Procedure Act, then, according to the rules which govern the decisions of the Courts, if decided cases have determined the construction to be placed on the Common Law Procedure Act, we must adhere to those decisions when we are called upon to place a construction upon that part of the Arbitration Act in which the same language is used with regard to the same subject-matter” : *per* Esher, M.R., in *In re Keighley and Durant*, [1893] 1 Q. B. at p. 408.

(2) “The first observation I would make is that the Arbitration Act is an amending statute and not merely a consolidating one, and it was passed with full knowledge of the provisions of the Common Law Procedure Act, 1854, and the Judicature Act, 1873, bearing on the matter, and of the various decisions. . . . The true rule of interpretation where

larger words are used in the amending Act than were used in the principal Act is that such larger words were used intentionally and must have a meaning given to them accordingly": *per* Lord Esher, M.R., in *Hurlbutt v. Barnett*, [1893] 1 Q. B. at p. 79.

(3) "Stress was laid by the learned judges below upon the provisions of the 24th section of the Arbitration Act, which enacts that the Arbitration Act shall apply to every arbitration under any Act passed before or after the commencement of that Act as if the arbitration were pursuant to a submission, 'except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.' But the only effect of that section is to apply the arbitration provisions to arbitrations under any other Act, as, for example, arbitrations under the Companies Acts, except so far as the arbitrations under those Acts are conducted pursuant to statutory provisions inconsistent with the provisions of the Arbitration Act. Its effect is in no way to introduce into arbitrations under the Arbitration Act any of the provisions for arbitration contained in any of the other Acts, such as the Companies Act": *per* Lord Halsbury, C., in *Zelma Gold Mining Co. v. Hoskins*, [1895] A. C. at p. 103.

The Arbitration Act, 1889, contains the following provision in sect. 6 thereof. The proviso is important, but though the section is very similar to sect. 25 of the Lands Clauses Act, it is not exactly similar, and it would seem, therefore, that the Court would not have power to set aside an appointment made under sect. 25:—

"6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

"(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

"(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

'Provided that the Court or a judge may set aside any appointment made in pursuance of this section.'

II. When a single arbitrator may award.

Illustrations.

(1) "The statute contemplates three cases where a single arbitrator is to award; and in each of those cases he has three months for the purpose, viz.: Where a single arbitrator is originally appointed, under sect. 25, or a vacancy is left unsupplied, *vide*

under sect. 26, or one of the two refuses or neglects to act, *vide* under sect. 30, it is to be observed that the umpire cannot be brought into action in either of these cases": *per* Denman, C.J., in *In re Bradshaw, In re East and West India Docks* (1848), 12 Q. B. at pp. 574—575.

(2) "The claimant should appoint an arbitrator on his behalf, and then after notification of such appointment and request in writing, if the other party fails, for the space of fourteen days, to appoint an arbitrator on his behalf the claimant may appoint one to act for both. The ground for requiring an actual appointment of an arbitrator by the claimant is that the other party may consider whether he will acquiesce in that appointment": *per* Parke, B., in *Bradley v. London and North-Western Ry.* (1850), 5 Ex. at p. 773.

III. Appointment of and delivery of appointment to arbitrator.

The section requires that the appointment shall be delivered to the arbitrator.

Illustration.

The defendants' works injuriously affected the lands of the plaintiff. The plaintiff claimed compensation and gave notice on December 16th, 1858, that unless the defendants paid the amount claimed within twenty-one days he desired to have the compensation settled by arbitration. Twenty-one days after this notice the plaintiff by writing under his hand nominated an arbitrator and on January 17th, 1859, gave notice to the defendants that he had done so, and required them to appoint an arbitrator. On January 25th the defendants made a tender to the plaintiff, which was refused. The defendants then nominated an arbitrator on their part, and a less sum was ultimately awarded than the amount tendered:—*Held*, that the plaintiff was not entitled to the costs of the arbitration as the tender was in time, inasmuch as the plaintiff had not pursued the proper steps pointed out in sect. 25 and had not delivered his appointment to the arbitrator at the time the tender was made: *Yates v. Blackburn Corporation* (1860), 6 H. & N. 61.

(a) The appointment must be actually made and communicated; a mere intention to appoint is not sufficient.

Illustrations.

(1) "Each of the parties was to nominate a referee on a certain day. Now, what is a nomination? . . . But it seems to me that there was no effective nomination till the notice was given to the other parties": *per* Coleridge, J., in *Tew v. Harris* (1847), 11 Q. B. at p. 11. (This case was not under the Lands Clauses Act.)

(2) T. B. claimed compensation from a railway company for damage to his premises arising from the making of a tunnel very near to his premises, and, the company having refused it, he on December 5th served a notice under the Lands Clauses Act, s. 25, requiring the appointment of an arbitrator for the company and stating that it was his intention to appoint M. as his arbitrator, and that, if for the period of fourteen days after that notice the company failed to appoint an arbitrator, he would appoint M. to act for both parties. The company having refused to refer the matter to arbitration, T. B. on January 1st served a notice on the company reciting that he had appointed M. as his arbitrator, and he now appointed M. to act for both parties. The arbitrator having awarded a certain sum to be paid to T. B., the Court refused to enforce or to set aside the award on motion, intimating that, in their opinion, there was no valid nomination of the arbitrator: *Bradley v. London and North-Western Ry.* (1850), 5 Ex. 769.

IV. If the parties agree to a reference to an arbitrator who is to be selected by others this is not a reference under the Lands Clauses Act, but a general reference by the parties in accordance with its provisions.

Illustration.

The owner of a mill on a stream becoming entitled to compensation for the abstraction of water by the defendants, agreed with them to refer the matter to an arbitrator to be selected by two persons, one nominated by each party. No offer of compensation was made by the defendants before going to arbitration: an award was made of a sum exceeding 50*l.* :—*Held*, that this was not a reference under the Lands Clauses Act, but a general reference in accordance with its provisions, and that the plaintiff was entitled to his costs: *Martin v. Leicester Waterworks* (1858), 3 H. & N. 463.

V. Scope of submission.

A submission may by consent be made to embrace incidents and powers not included in a reference proceeding strictly under the provisions of the Act, and in such a case it includes in it by reference to the statute the statutory provision of irrevocability.

Illustration.

A company gave L. notice that they required of him particulars of his interest and of his claim in respect thereof. The claim was given, and consisted of L.'s demand in respect of—(1) the land proposed to be taken; (2) intersectional damage; (3) injury to the amenity of the mansion-house; (4) the value of wood; and (5) bridges and access. The matters in dispute were referred by deed to the decision of Professor L. The scope of the inquiry by the referee was extended beyond the provisions of the Lands Clauses (Scotland) Act :—*Held*, that the arbitration was both under statute and at common law, and that the award could not be set aside: *Caledonian Ry. v. Lockhart* (1860), 3 Macq. H. L. 808. "It is, therefore, unnecessary to determine whether the arbitration is statutory or at common law. But I rather think it is, as it has been termed in the course of the argument, 'hybrid.' It is compounded of both, and so considered it includes in it, by reference to the statute, the statutory provision that it shall not fail by the death of one of the parties": *per* Lord Wensleydale at p. 823, *ib.*

VI. Revocation.

(a) The words of the section provide that "neither party shall have power to revoke the same without the consent of the other," but it would seem that the "Court" may give leave to revoke the submission under sect. 1 of the Arbitration Act, 1889, read in connection with sect. 24 of that Act. Sect. 1 is as follows:—

"1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

(b) And it appears that in the following cases the discretion of the Court was exercised with respect to the revocation or setting aside of the submission.

Illustrations.

(1) A notice to treat contained the following qualification :—"So far as such estate and interest is an estate or interest for which you are entitled to purchase-money or compensation other than such as may be payable under any other notice to treat in respect of the same lands" :—*Held*, that words so introduced could not restrict or limit the scope of the reference to arbitration, and the application to set aside the reference was dismissed : *In re Chilworth Gunpowder Co. and Manchester Ship Canal* (1891), 8 T. L. R. 79.

(2) At an arbitration to determine the amount of compensation due to G. in respect of certain minerals, the arbitrator admitted evidence which, it was contended on behalf of the company, was inadmissible, the mining clauses (sects. 77—85) of the Railways Clauses Act being applicable, and G.'s right to compensation not having arisen. The Court set aside the submission, on the ground of improper reception of evidence : *In re Gerard (Lord) and London and North-Western Ry.*, [1895] 1 Q. B. 459.

NOTE.—It was held by a Divisional Court that an appeal from a judge at chambers granting leave to revoke a submission to arbitration lies to the Court of Appeal, and not to a Divisional Court : *In re Portland Urban Council and Tilley*, [1896] 2 Q. B. 98. But compare *Watson v. Petts*, [1899] 1 Q. B. 54 (an application for a prohibition to an inferior court), and *Long v. Great Northern and City Ry.*, [1902] 1 K. B. 813 (an application to a judge in chambers under the Regulation of Railways Act, 1868, for an order that the question of compensation be tried in the High Court), in each of which it was decided that the words "practice or procedure" in the Judicature Act, 1894, meant matters of practice or procedure in connection with a cause or matter in the High Court, and therefore that in other matters the appeal from chambers is to the Divisional Court. These cases were followed in *In re Frere and Staveley Taylor & Co. and North Shore Mill*, [1905] 1 K. B. 366, where it was held that an appeal from an order in chambers directing an arbitrator to state a case in the arbitration did not lie direct to the Court of Appeal.

VII. Disqualification of arbitrators.

The following cases as to disqualification have arisen under the Lands Clauses Act :—

Illustrations.

(1) The surveyor of a railway company had, in that character, treated with a landowner and offered a price for land required by the company. He was afterwards nominated by the company and acted as their arbitrator under the Lands Clauses Act :—*Held*, that he ought not to have been selected as an arbitrator ; but the owner, being aware of the fact, and, although protesting against the selection, proceeding with the arbitration, could not afterwards object : *In re Elliott and the South Devon Ry.* (1848), 2 De G. & Sm. 17. A surveyor to and shareholder in a railway company which was greatly interested and a considerable shareholder in another railway company was, in an arbitration between the latter company and a landowner, appointed umpire by the arbitrators, and made an award. The landowner did not discover these facts until after the date of the award, and thereupon obtained an order *nisi* to set aside the award on that ground :—*Held*, that whatever objections there might be in a moral sense, there were no judicial grounds for setting aside the award : *ib.*

(2) Land belonging to the trustees of Emanuel Hospital being required by the Metropolitan District Railway Co., a claim of 24,000*l.* was made therefor by the owners, but the

company would not pay that amount. A precept was thereupon directed to the high bailiff of Westminster, and a jury was accordingly summoned to assess the compensation. At the inquisition a deputy appointed by the high bailiff presided. The jury assessed the value at 10,000*l*. Motion was afterwards made for a *certiorari* to bring up the inquisition upon the grounds—(1) that the high bailiff had no power to appoint a deputy; and (2) that the precept ought to have been addressed to the sheriff of Middlesex:—*Held*, that these objections ought to have been made at the inquisition: *Emanuel Hospital v. Metropolitan District Ry.* (1869), 19 L. T. 692.

(3) On July 22nd, 1881, Y. was appointed by the claimants to be their arbitrator to settle the value of certain freehold property required by the respondents, and to assess the compensation for severance and other damage. On July 20th, 1881, R. had been appointed arbitrator by the respondents. On September 19th, 1881, R. submitted the names of three persons to Y. from which to choose an umpire, and Y. selected W. On October 11th, 1881, the parties attended before the umpire, and he and the arbitrators went to view the property. While on the way R. called W.'s attention to some other properties near that of the claimants. Shortly before October 11th Y. saw it reported that W. had been giving evidence for the respondents as to other property. The umpire made his award on November 22nd, and on December 20th claimants' solicitors wrote to respondents' solicitors saying that they intended to move to set aside the award. No other objection had been made before this date that W. was not a disinterested person:—*Held*, that the objection came too late, the claimants having enough knowledge of W.'s position before the award was made to enable them to object: *In re Clout and Metropolitan and District Rys.* (1882), 46 L. T. 141.

(4) Motion to set aside the award of an umpire on the ground that he had accepted a retainer from one of the parties to give evidence on their behalf in another reference with respect to the value of land of a similar character in close proximity to the claimant's land:—*Held* to be no effective objection, although "it is very desirable that persons who are asked to act as umpires in such cases should inform the parties or their arbitrators of any facts which might prevent their assenting to their acting as umpires": *In re Haigh and the London and North-Western and Great Western Rys.*, [1896] 1 Q. B. 649.

VIII. Restraining arbitration proceedings.

An injunction will not be granted to restrain the continuance of the arbitration unless some obvious injustice or injury would be done if it proceeded, or unless an action has been begun in which the contract between the parties to the arbitration is being impeached.

Illustrations.

(1) A railway company gave notice to the lessees of a factory and buildings that they required a part of the premises. The lessees thereupon gave a counter-notice requiring the company to take the whole. The company took no further steps until the leases had expired. The lessees having continued in possession, the company, without serving any fresh notice, had the value of their interest in the whole of the premises assessed, deposited the amount in court, executed a bond, and took possession of part of the premises. The lessees, conceiving that the company had no right to proceed under sect. 85, sent in a claim and gave them notice to issue their warrant to the sheriff to summon a jury to assess compensation under sect. 68. The company then filed their bill to restrain these proceedings. Upon motion to dissolve an injunction granted *ex parte*:—*Held*, that

the injunction to restrain proceedings by the defendants under sect. 68 must be continued until the rights of the several parties had been ascertained : *London and South-Western Ry. v. Cward* (1848), 5 Rail. Cas. 703 ; followed in *Kitts v. Moore*, [1895] 1 Q. B. 253, 263.

(2) The construction of a coffer dam having, for a time, prevented the usual approach of ships to a warehouse, the lessee thereof claimed 65*l.* compensation, or to have the same ascertained by arbitration. The Court refused to grant an injunction restraining him from proceeding under the Lands Clauses Act, considering itself not justified in interfering with the course plainly laid down in that Act : *Sutton Harbour v. Hitchens* (1851), 1 De G. M. & G. 161.

(3) The B. Local Board of Health under the powers of the Public Health Act, 1848, altered the levels of two streets to which H.'s houses fronted. H. proceeded under sect. 123 of that Act to take steps to ascertain the amount of compensation for the damage to his property. The board moved for an injunction to restrain him :—*Held*, that sect. 123 of the Public Health Act was not distinguishable from sect. 25 of the Lands Clauses Act, and that the injunction must be refused : *Bradford Local Board v. Hopwood* (1858), 6 W. R. 818.

(4) "I entirely adopt what Lindley, L.J., says in the case of the *London and Blackwall Ry. v. Cross*, 31 Ch. D. at p. 368, namely, that there are cases in which the Court will restrain parties from proceeding to arbitration. . . . I do not think the decision in the *North London Ry. v. Great Northern Ry.*, 11 Q. B. D. 30, would prevent my doing so in a proper case, that is to say, in a case in which I saw that injustice or injury which ought not to be borne would result to the party complaining from the arbitration proceeding. But where I see that merely futile proceedings may result or that nothing to injure the plaintiff is likely to result, I do not think that I ought to grant an injunction" : *per Kekewich, J.*, in *Farrar v. Cooper* (1890), 44 Ch. D. at p. 328.

(5) Disputes having arisen between K. and M., the parties to a contract, arbitrators were appointed to adjudicate upon them. K. commenced an action impeaching the contract and asking for a declaration as to the position of the parties, for an account, and for an injunction to restrain M. from proceeding to arbitration :—*Held*, that the Court had power to grant an injunction restraining the reference to arbitration until the right to impeach the contract had been determined : *Kitts v. Moore*, [1895] 1 Q. B. 253.

26. If, before the Matters so referred shall

Vacancy of Arbitrator to be supplied.

be determined, any Arbitrator appointed by either Party die, or become incapable, the Party by whom such Arbitrator was appointed may nominate and appoint in Writing some other Person to act in his Place, and if, for the Space of Seven Days after Notice in Writing from the other Party for that Purpose, he fail to do so, the remaining or other Arbitrator may proceed *ex parte* ; and every Arbitrator so to be substituted as aforesaid shall have the same Powers and Authorities as were vested in the former Arbitrator at the Time of such his Death or Disability as aforesaid.

This section only provides for the contingencies of death or incapacity of either of the arbitrators appointed by the parties, and in either event notice has to be given; but if an arbitrator should refuse or neglect to act the person appointing him is in a worse position under sect. 30, for no notice in that case has to be given, and the person who appointed such arbitrator cannot appoint another.

Appointment of
Umpire.

27. Where more than One Arbitrator shall have been appointed such Arbitrators shall, before they enter upon the Matters referred to them, nominate and appoint, by Writing under their Hands, an Umpire to decide on any such Matters on which they shall differ, or which shall be referred to him under the Provisions of this or the Special Act, and if such Umpire shall die, or become incapable to act, they shall forthwith after such Death or Incapacity appoint another Umpire in his Place, and the Decision of every such Umpire on the Matters so referred to him shall be final.

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I. In what circumstances an umpire may be appointed by arbitrators.

An umpire can be appointed only—(i.) “where more than one arbitrator shall have been appointed”; (ii.) the appointment must be made “before they [the arbitrators] enter upon the matters referred to them”; (iii.) the appointment must be made in writing “under their hands.”

See *Shepherd v. Norwich Corporation*, p. 213, *post*.

II. Manner of selection of umpire.

(a) The arbitrators in selecting an umpire must exercise their judgment in the matter; they cannot select him by mere chance, as by casting lots.

Illustrations.

(1) Where the parties named two arbitrators who were to choose a third and the award was to be made by the three or any two of them, and each of the arbitrators proposed to the other an admittedly fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot, which was done:—*Held*, that such appointment was good, as this was not a tossing up between the two arbitrators which should nominate the third in exclusion of the other, but was a selection by lot of one of two fit persons: *Neale v. Ledger* (1812), 16 East, 51; 14 R. R. 283.

(2) A submission was made to two arbitrators and to such third person as they should appoint, the award to be made by any two of the three. The two arbitrators met for the purpose of appointing a third, and, not being able to concur in such appointment, it was agreed between them that each of them should name two, and that the names of the four should be put into a hat and that the name drawn should be the third arbitrator, which was done :—*Held*, that the appointment of the third arbitrator was bad, inasmuch as the choice ought to have been the act of the will and judgment of the two, and matter of choice, not of chance : *In re Cassell* (1829), 9 B. & C. 624.

(3) Two arbitrators met for the selection of an umpire. Each proposed one, but, although both were assumed to be fit persons to be appointed, neither of the arbitrators would consent to withdraw his nominee. It was then agreed between them that the names should be written upon two slips of paper and placed in a hat, and that the first one drawn should be the umpire. This having been done, the two arbitrators went together to the person chosen and requested him to act :—*Held*, that one of the parties to the reference was entitled, upon these facts coming to his knowledge, to revoke his submission : *European and American Steam Shipping Co. v. Crosskey* (1860), 8 C. B. N. S. 397 ; *In re Cassell* (*ante*) followed.

(4) When each of two arbitrators had selected a person to act as umpire, and, while both agreed that either person so chosen would be a fit and proper person to act as umpire, were yet unable to agree upon the selection of either, and thereupon appointed one of such persons by lot to be umpire :—*Held*, a good appointment : *Morgan v. Bolt* (1863), 1 N. R. 271.

(5) Different persons were proposed as umpire by two arbitrators. They agreed that the persons so proposed were fit and proper persons to be appointed, but neither would accept the other's nominee. They therefore selected one by drawing lots :—*Held*, that there was no objection to this method of selection, the arbitrators having exercised their judgment in the matter before casting lots : *In re Hopper* (1867), L. R. 2 Q. B. 367.

(6) Certain matters were referred to arbitration. Two arbitrators were appointed, who met at an hotel to appoint an umpire. Each nominated a man unknown to the other, and put the two names into a hat and directed the waiter to draw one out :—*Held*, that the arbitrators not knowing whether the persons respectively nominated by each other were fit to act as umpire, the appointment was bad : *Pescod v. Pescod* (1887), 58 L. T. 76. "It appears that the gentleman, Brown, who was appointed, was not known to the other arbitrator at all, so that this arbitrator could not properly exercise his choice, inasmuch as he had no knowledge whatever of Brown when his name was proposed. . . . In acting as he has done, he [the arbitrator] has evaded his judicial duty by leaving the appointment to chance" : *per Kay, J., ib.*

(b) Sect. 27 of the Lands Clauses Act enables the arbitrators to appoint another umpire in two cases only—(i.) if the umpire originally appointed shall die ; and (ii.) if such umpire shall become incapable of acting. Another case may, however, arise, namely, by the umpire originally selected refusing to act (*see illustration below*). In such a case the Court, it would seem, would now have power to appoint another umpire under sect. 5 of the Arbitration Act, 1889 (*see infra*).

Illustration.

The arbiters appointed under the provisions of the Lands Clauses Act to decide upon a claim against a railway company for compensation having differed in opinion, and the oversman

whom they had previously nominated having, when requested, declined to act, no award was pronounced :—*Held*, that the provisions of the 35th section of the Lands Clauses (Scotland) Act, which enacts that where, when the matter shall have been referred to arbitration, the arbiters or their umpire shall for three months have failed to make their or his award, the question of compensation should then be settled by the verdict of a jury, was applicable to this case ; and the plea was *repelled* that, the oversman (umpire) having refused to act, there had never been a completed arbitration under the statute, and parties were entitled to appoint arbiters of new to dispose of the claim : *Anderson v. Deeside Ry.* (1853), 15 Ct. Sess. (2nd series) 713.

Sect. 5 of the Arbitration Act, 1889, is as follows :—

“ 5. In any of the following cases :—

“(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator :

“(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy :

“(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him :

“(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy :

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

“If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference, and make an award as if he had been appointed by consent of all parties.”

NOTE 1.—The language of sect. 5 (*supra*) is similar to that of sect. 12 of the Common Law Procedure Act, 1854, under which the following case was decided :—

Illustration to Note 1.

Sects. 161 and 162 of the Companies Act, 1862, provide that in certain cases as to shares disputes are to be settled by arbitration under the Companies Clauses Act. Sects. 128—130 of the latter Act provide for the appointment of two arbitrators, one by each party, and the arbitrators are to appoint an umpire ; but in case of their default, sect. 131 provides that, if one party is a railway company, the umpire is to be appointed by the Board of Trade, but makes no provision in any other case. A dispute as to the price payable for shares having arisen between a shareholder and a company not a railway company, and the arbitrators having neglected to select an umpire :—*Held*, following *In re Lord*, 1 K. & J. 90, that

sect. 12 of the Common Law Procedure Act, 1854, applied to the present case, and a judge could therefore appoint an umpire under that section: *In re Anglo-Italian Bank and de Rosaz* (1867), L. R. 2 Q. B. 452; followed in *De Rosaz v. Anglo-Italian Bank* (1869), L. R. 4 Q. B. 462.

NOTE 2.—Under the general law, and unless the submission otherwise provides (as to this see *Lang v. Brown* (1855), 25 L. T. (O.S.) at p. 298), where questions are referred to arbitrators, and in case they disagree, to an umpire, the latter must, on the matter falling to be decided by him, make his award on all questions included in the submission, and not merely on such of them as to which the arbitrators have disagreed (see *Tollit v. Saunders* (1821), 9 Price, 612). It will be observed, however, that sect. 27 empowers the umpire “to decide on any such matters on which they [the arbitrators] shall differ, or which shall be referred to him under the provisions of this or the special Act,” so that there may, it would seem, be an adjudication on some points by the arbitrators and on others, as to which they have disagreed, by the umpire.

Board of Trade empowered to appoint an Umpire on Neglect of the Arbitrators, in case of Railway Companies.

28. If in either of the Cases aforesaid the said Arbitrators shall refuse, or shall, for Seven Days after Request of either Party to such Arbitration, neglect to appoint an Umpire, the Board of Trade, *in any Case in which a Railway Company shall be one Party to the Arbitration, and Two Justices in any other Case*, shall on the Application of either Party to such Arbitration, appoint an Umpire, and the Decision of such Umpire on the Matters on which the Arbitrators shall differ, or which shall be referred to him under this or the Special Act, shall be final.

NOTE.—The words in italics were repealed by 46 & 47 Vict. c. 15 (the Lands Clauses (Umpire) Act, 1883).

Where arbitration proceedings have gone off and the time allowed to the Board of Trade for appointing an umpire has expired, the party claiming compensation may give notice to the promoters requiring them to issue their warrant to the sheriff to summon a jury to assess the amount of compensation, and upon refusal of the promoters to comply with such notice, a *mandamus* will lie to compel them to do so: *In re South Yorkshire, Doncaster and Goole Ry., Ex parte Senior* (1849), 7 D. & L. 36.

Appointment of an umpire by the Court (*see* sect. 27, *ante*).

In case of Death of single Arbitrator the matter to begin de novo.

29. If, when a single Arbitrator shall have been appointed, such Arbitrator shall die or become incapable to act before he shall have made his Award, the Matters referred to him shall be determined by Arbitration under the Provisions of this or the

Special Act in the same Manner as if such Arbitrator had not been appointed.

The effect of this provision seems to be that the parties must begin *de novo* and appoint another arbitrator or arbitrators.

If either
Arbitrator refuse
to act the other to
proceed *ex parte*.

30. If, where more than One Arbitrator shall have been appointed, either of the Arbitrators refuse or for Seven Days neglect to act, the other Arbitrator may proceed *ex parte*, and the Decision of such other Arbitrator shall be as effectual as if he had been the single Arbitrator appointed by both Parties.

NOTE.—See *ante*, p. 209, and sect. 6 of the Arbitration Act.

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I. Interpretation of the section.

Illustration.

On June 6th, 1884, the plaintiff appointed H. to be his arbitrator in determining the amount of compensation due to him, and on June 17th, 1884, the defendants nominated S. as their arbitrator. H. thereupon requested S. to act with him, but S. declined so to do. Notice was accordingly given him that, if for seven days after date he neglected to act, H. would proceed *ex parte*. On August 13th, 1884, H. proceeded *ex parte* and made his award. The arbitrators did not appoint any umpire :—*Held*, that the words of sect. 27 do not necessarily or in terms indicate the necessity of an umpire being appointed before one arbitrator proceeds to act *ex parte*, where, under the Act, he has power to do so, but are confined to the case when two persons are ready and willing to enter upon, and are prepared to enter upon, the matters referred to them : *Shepherd v. Norwich Corporation* (1885), 30 Ch. D. 553. "What is contemplated by the 30th section is one person proceeding *ex parte*. I am asked to read that section as if it had provided for either of the arbitrators refusing or neglecting to act after an umpire has been appointed. There is nothing of that sort in this section. There is nothing that I can find in the Act indicating that those words should be so read, and the general words that are used seem to me to have precisely the same effect as if the section ran 'if, where more than one arbitrator has been appointed, either of the arbitrators, either before or after the appointment of an umpire, refuses or neglects to act,' and so on. If the refusal only took place after they had entered upon the matters in difference, then, of course, the umpire must previously have been appointed to make that entry upon the matters in difference between the two, a proper step to take ; but if they had not entered on the matters in difference at all, then it appears to me the thing for which the arbitrator was to be appointed, namely, the settlement of the difference between these parties, only points to the settlement in an event that never can arrive, and therefore that this 30th section does not necessarily refer to a case in which an

umpire has been appointed. It applies to such a case if that stage of the arbitration has been reached, but I see nothing to prevent it applying at the earlier stage of their not having entered on the matters in difference, if immediately after his appointment one arbitrator refuses to enter upon the matter": *per* North, J., at p. 562, *ib*.

II. What is a "refusal" or "neglect" to act?

(a) Mere absence of an arbitrator from a meeting after entering on the reference is not a refusal to act.

Illustration.

A claim for compensation by A. and B. against a railway company was referred to arbitration. The reference was opened, and the business proceeded, in the presence of all parties, on the first day, but on the following day the company's arbitrator failed to attend, and their solicitor protested in writing against proceeding in his absence. The arbitrator then present, and the umpire, who was also present, but whose time for acting had not commenced, sent a notice to the arbitrator of their intention to proceed, and a witness was examined on behalf of A. and B., but no evidence was adduced by the company. The company gave notice to the arbitrators and umpire not to make an award. The time within which the arbitrators were to make their award having expired, A. and B. called upon the umpire to make his award, which he did, without hearing any evidence except that given by the witness before mentioned:—*Held*, that the award so made by the umpire in the absence of and without notice to one of the parties was invalid: *In re Hawley and North Staffordshire Ry.* (1848), 5 Rail. Cas. 383.

(b) The erroneous omission to make an award in time is a neglect to act.

Illustration.

A private Act appointed an arbitrator for certain purposes, and provided that, if he should "die or neglect or refuse to act or become incapable of acting," it should be lawful for the bishop of the diocese, on petition, to appoint another arbitrator with powers similar to those of the first, but the arbitrator so nominated should make his award within the time to be fixed by the bishop. The arbitrator, under a mistake that he was not able, or bound, to make an award until the commissioner appointed by the Act had made his, failed to make his award within the six months prescribed for that purpose in the Act:—*Held*, that the erroneous omission to make an award in time was "neglect" to act, and justified the nomination of another arbitrator: *Willoughby v. Willoughby* (1847), 9 Q. B. 923.

31. If, where more than One Arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such Arbitrators shall fail to make their Award within Twenty-one Days after the Day on which the last of such Arbitrators shall have been appointed, or within such extended Time (if any) as shall have been appointed for that Purpose by both such Arbitrators under their Hands, the Matters

If Arbitrators fail to make their Award within Twenty-one Days the Matter to go to the Umpire.

referred to them shall be determined by the Umpire to be appointed as aforesaid.

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I. The arbitrators have power to appoint an umpire, although the period of twenty-one days has expired.

Illustrations.

(1) A claim for compensation having been made by B., who elected to have his claim heard before arbitrators, these were appointed, one on March 25th, the other on April 6th. The arbitrators having, for seven days after receiving a request so to do, neglected to select an umpire, B. applied to the Board of Trade to appoint one. This was done by the Board on May 17th. It was contended that the umpire ought to have been appointed within twenty-one days of April 6th :—*Held*, that the objection was bad, the power to appoint an umpire continuing for three months after the appointment of the arbitrators : *In re Bradshaw and East and West India Docks Ry.* (1848), 12 Q. B. 562. "But it appears to us . . . that the 31st section, providing that the umpire shall determine, where neither of the arbitrators refuses or neglects to act and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire, but not to render void the submission to arbitration and the other powers incidental thereto, such as the appointment of an umpire. . . . The incapacity to make an award has no effect upon the power given to the arbitrators under sect. 27, and to the Board of Trade, on their default, under sect. 28, to appoint a new umpire in case of the death or failure of the first. And we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire" : *per* Denman, C.J., at pp. 574 and 575, *ib.* ; see also *In re Wilts, Somerset and Weymouth Ry. and Fooks* (1849), 3 Ex. 728.

(2) A claim for compensation having been made by H. under the Public Health Act, 1848, arbitrators were appointed on August 10th and August 14th, but nothing further was done until October 26th, when they were called upon to appoint an umpire. This was done on October 31st. It was objected that the appointment of the umpire was invalid, having been made more than twenty-one days after the appointment of the latter of them, this being the time limited by sect. 125 of the Public Health Act, 1848 :—*Held*, following *In re Bradshaw (supra)*, that the appointment was good : *Holdsworth v. Barsham* (1862), 31 L. J. Q. B. 145.

(3) The plaintiff appointed his arbitrator on August 10th, 1860, and a local board nominated theirs on the 14th of the same month. The arbitrators neither enlarged the time nor took any steps under the reference ; accordingly in October, 1860, the plaintiff called upon them to appoint an umpire within seven days from the date of the notice. Pursuant to the notice the arbitrators met and appointed an umpire, but declined to proceed with the reference :—*Held*, that the nomination of the umpire was valid, having been made within three months of the later appointment : *Holdsworth v. Wilson* (1863), 4 B. & S. 1.

II. The period of three months limited by sect. 23 of the Lands Clauses Act for the making of the award runs as regards the umpire from the date when the arbitration devolves upon him.

Illustrations.

(1) On February 23rd. 1847, the defendant company appointed their arbitrator and served notice thereof on the plaintiff. On March 9th the plaintiff appointed his arbitrator, and on March 29th the two arbitrators nominated an umpire. The arbitrators failed to make an award, which was ultimately made by the umpire and dated June 29th, 1847 :—*Held*, that the award was made in time : *Skerratt v. North Staffordshire Ry.* (1848), 2 Ph. 475. “I think, therefore, that, as regards the umpire, the three months begin to run from the time when the arbitration devolves upon him, which, in this case, was at the expiration of three weeks from March 9th : and, therefore, that the award being made on June 29th, was in due time” : *per* Lord Cottenham, L.C., at p. 477, *ib.*

(2) The parties appointed two arbitrators, who made no award, nor appointed an umpire, under sect. 27, within twenty-one days after the last appointment, after which time the Board of Trade appointed an umpire, who made his award within three months of his appointment :—*Held*, that the appointment was valid, and that the award had been made in due time, as required by sect. 23 : *In re Bradshaw, In re East and West India Docks* (1848), 5 Rail. Cas. 527. “We find it decided in *Ex parte Skerratt v. The North Staffordshire Ry.* [*supra*], that the three months for the umpire commences from the duty devolving upon him. In this decision we fully concur, and as this award of the umpire was made within three months from the duty devolving upon him, and, indeed, within three months from his appointment, it is not too late” : *per* Lord Denman, C.J., at p. 536, *ib.*

(3) On May 17th P. gave a corporation notice of his claim and of his desire to have it determined by arbitration. On August 16th P. appointed an arbitrator and on August 29th the corporation nominated theirs. No award was made by the arbitrators, nor did they extend the time for making one, nor could they agree upon an umpire, and one was therefore nominated by a magistrate on October 3rd. The inquiry was held on November 29th and the award made on December 20th :—*Held*, that the time within which the umpire should make his award began to run on October 3rd : *In re Pullen and Liverpool Corporation* (1882), 51 L. J. Q. B. 285.

III. The Court has power to extend the time for making an award under sect. 9 of the Arbitration Act, which is as follows :—

“9. The time for making an award may from time to time be enlarged by order of the Court or a judge, whether the time for making the award has expired or not.”

The Arbitration Act, 1889, is similar in this respect to the Common Law Procedure Act, 1854, now repealed. Sect. 15 of that Act contains the following provision :—

“And it shall be lawful for the superior Court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award.”

But while the Court has this power, it has declined to exercise it where there has been unreasonable delay.

Illustration.

The respondents claimed, in 1864, for the value of their land required by a railway company. Differences having arisen as to the amount to be paid, arbitrators and an umpire were appointed, and an award was made by the umpire in 1868. This award was referred back to the umpire, and, nothing further having been done, the respondents, on February 5th, 1869, gave notice of their desire to have the question of compensation settled by a jury. The company required the respondents to proceed before the umpire, but the respondents contended that proceedings before the umpire would be out of time, and that the question must go before a jury :—*Held*, that the Court had power to enlarge the time for making the award under the Common Law Procedure Act, 1854, but that, having regard to the delay which had taken place, this jurisdiction ought not to be exercised so as to deprive the respondents of their right to go before a jury : *In re Dare Valley Ry.* (1869), L. R. 4 Ch. 554.

NOTE.—The Court had no power under the Common Law Procedure Act, 1854, s. 15, or otherwise, to enlarge the time in arbitrations under the Public Health Act : *Kellett v. Trammere Local Board* (1864), 34 L. J. Q. B. 87.

IV. The parties may by their conduct be estopped from setting up want of jurisdiction in the arbitrator or umpire.

Illustrations.

(1) A cause was referred to one C. by a judge. C. entered on the reference on July 3rd, 1855, and made his award on February 7th, 1856. On April 21st, 1856, the award was made a rule of court, and on May 14th, 1856, judgment was entered up by the defendant. No written consent had been given by either party for enlarging the time for making the award. The plaintiff had, however, attended meetings before the referee as late as January 7th, 1856 :—*Held*, that the plaintiff was estopped by these facts from alleging that the circumstances necessary to give the referee jurisdiction did not exist : *Tyerman v. Smith* (1856), 6 El. & Bl. 719.

(2) On July 1st, 1859, an order was made to refer a cause to arbitration, and the last attendance before the arbitrator was on February 3rd, 1860. The award was made on March 28th, 1860. It was alleged, in answer to the application to set aside the award, that at the last meeting the matter was adjourned, by consent, to give time for the referee to prepare his certificate, and that, although it was made on March 28th, no objection had been made until April 20th :—*Held*, that the consent to the last adjournment might be deemed a parol agreement to enlarge the time generally for an award to be made within any reasonable time : *Bennett v. Watson* (1860), 29 L. J. Ex. 357.

(3) "The provision in the statute that if the decree is not made within a specified time the matter shall be settled by a jury is a stipulation introduced to prevent either party to the submission being prejudiced by unreasonable delay, and could not have been meant to prevent any extension of time which both parties considered desirable for their common convenience" : *per* Lord Cranworth in *Caledonian Ry. v. Lockhart* (1860), 3 Macq. at p. 817.

(4) "The first point urged . . . was, that the award was made after the time for making it had expired, and therefore was a nullity, and that the objection could not be

cured by consent of parties. I do not think that objection is good. The arbitration clauses being introduced for the benefit of the parties, they are at liberty to renounce at their pleasure the advantages which those clauses afford": *per* Mellor, J., in *Palmer v. Metropolitan Ry.* (1862), 31 L. J. Q. B. at p. 260.

(5) R. claimed compensation from a local board, and the claim was referred to arbitration under sect. 124 of the Public Health Act, 1848. The umpire, without enlarging the time, proceeded after the time for making his award. The board attended under protest, and cross-examined R.'s witnesses and called witnesses:—*Held*, that they were not precluded from afterwards objecting that the umpire had proceeded without authority: *Ringland v. Lowndes* (1864), 17 C. B. (N.S.) 514.

(6) By an agreement the matter of the construction of certain crossings was referred to the decision of C., who was to make his award in the matter within one month of the taking of possession of the land by the railway company. C. made his award on March 5th, 1859. The nature and number of the crossings had been arranged at a meeting on November 16th, 1858, at which the respondents' agents, Cubitt and Oakley, were present, and later communications were chiefly as to the mode of execution of the works:—*Held*, that the conduct of Cubitt and Oakley did not operate as an enlargement of the time within which C. was to notify his decision as to the nature and number of the crossings or to enable him to direct the construction of a certain cattle arch: *Darnley (Earl) v. London, Chatham and Dover Ry.* (1867), L. R. 2 H. L. 43.

V. An arbitrator or umpire has power under sects. 7 and 19 of the Arbitration Act, 1889, during the arbitration or in his award, to state a case for the opinion of the Court. Sects. 7 and 19 are as follows:—

“7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

“ (a) . . .

“ (b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court. . . .”

“19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.”

The provision of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to which the above section corresponds, is as follows:—

“5. It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior Courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court.”

Illustrations.

(1) In an arbitration under the Lands Clauses Act each party appointed an arbitrator, who again appointed an umpire. The umpire made his award in the form of a special case under sect. 25 of the Lands Clauses Act:—*Held*, that the appointment of an arbitrator by each party was “a submission to arbitration on the part of the party by whom the same shall be made,” and consequently the arbitration was by consent within sect. 5 of the Common Law Procedure Act, 1854, which gives an arbitrator in such case power to state his award in the form of a special case: *Rhodes v. Airedale Drainage Commissioners* (1876), 1 C. P. D. 402.

(2) “It is shown by *Rhodes v. Airedale Drainage Commissioners* [*supra*] that a reference under the Lands Clauses Consolidation Act, 1845, does fall within the Common Law Procedure Act, 1854, s. 5, and that the arbitrators have power to state a case for the opinion of the High Court. Therefore the case before us was stated, not pursuant to an authority given by the consent of parties, but under an authority which the Common Law Procedure Act, 1854, s. 5, conferred upon the umpire”: *per* Cotton, L.J., in *Bidder v. North Staffordshire Ry.* (1878), 4 Q. B. D. at pp. 425, 426.

(3) The words in sect. 19 of the Arbitration Act, 1889, “at any stage of the proceedings,” mean before the proceedings have come to an end by a completed award: *Tabernacle Permanent Building Society v. Knight*, [1892] A. C. at p. 302; *In re Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L. T. 406.

VI. Power to remit award back.

Sect. 10 of the Arbitration Act, 1889, provides as follows:—

“10.—(1.) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

“(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.”

Illustration.

The Court has power under this section of the Arbitration Act, 1889, to remit an award for further consideration even although the arbitrator or umpire may be *functus officio*: *In re Stringer and Riley*, [1901] 1 Q. B. 105.

VII. If the time limited by the Act has expired and the Court has not enlarged the time, the owner can, where no award has been made, compel the promoters to issue their warrant to the sheriff to summon a jury to assess the compensation.

Illustrations.

(1) Notice to treat having been given to a landowner, he signified his election under sect. 23 to proceed by arbitration. Two arbitrators were duly appointed, but failed to agree upon an umpire before the statutory period of three months from the appointment of the arbitrators had expired. The landowner thereupon required the railway company to issue their warrant to the sheriff to summon a jury, and gave notice that in default of such step being taken application would be made for a *mandamus* to compel the warrant

to be issued. The company served the landowner with notice of abandonment of their right and intention to take the land :—*Held*, that the owner was not bound to proceed *de novo* under sect. 68, and, in the event of a refusal by the company, was entitled to a *mandamus* to compel the issue of a warrant, and that neglect to issue the warrant, after demand made, was a sufficient refusal to entitle the claimant to the writ : *In re South Yorkshire, Doncaster and Goole Ry. Ex parte Senior* (1849), 7 D. & L. 36.

(2) A railway company, after a submission under the Lands Clauses (Scotland) Act had been entered into between them and a landowner, served upon him a second notice, limiting the amount of land to be taken, and proposed to proceed with the submission upon this notice. The owner obtained interdict against their proceeding with the submission upon this footing, but thereafter, upon the company abandoning the second notice, the interdict was recalled. The company having called upon the arbiters to proceed with the submission, and a second application for interdict having been made by the owner on the ground that, during the pendency of the earlier proceedings, the period of three months, within which, by sect. 35 of the Act, it was essential that the arbiters should make their award, had expired :—*Held*, that although the first interdict had been recalled, yet, the delay having been caused by the default of the company, the submission must be deemed to have fallen : *Laing v. Caledonian Ry.* (1850), 12 Ct. Sess. Cas. (2nd series) 481.

32. The said Arbitrators or their Umpire may call for the Production of any Documents in the Possession or Power of either Party which they or he may think necessary for determining the Question in Dispute, and may examine the Parties or their Witnesses on Oath, and administer the Oaths necessary for that Purpose.

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"May examine the parties or their witnesses on oath."

(a) It is not absolutely necessary to take evidence on oath, but it is usual, and if taken otherwise must be with the consent of the parties.

Illustration.

"I do not found my decision upon the point that the evidence was not taken upon oath, though I think it was a serious objection. It is not absolutely necessary to take the evidence upon oath, but it is the ordinary practice, and if taken otherwise both parties must waive its being taken upon oath" : *per Romilly, M.R., in Wakefield v. Llanelly Ry.* (1864), 34 Beav. at p. 249.

But now by Schedule I. of the Arbitration Act, 1889, it is provided as follows :—

"(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be

examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

“(g) The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath or affirmation.”

The Arbitration Act, 1889, provides also in sect. 7 as follows:—

“The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

“(a) to administer oaths or to take the affirmation of the parties and witnesses appearing.”

(b) The arbitrators or umpire may, if they think fit, consult experts and men of science in every department.

Illustrations.

(1) By a decree of the Lord Chancellor of Ireland it was referred to the arbitration of D. and V., with power to call in a third person as umpire, to determine the value of certain stock and property. During the reference the arbitrators obtained the assistance and advice of one H. in making the valuations, but they did not appoint him to be umpire:—*Held*, that the arbitrators had not acted wrongly in calling in H., as valuer, to assist them, and that this afforded no ground for setting aside the awards: *Anderson v. Wallace* (1835), 3 Cl. & F. 26.

(2) “The second objection—that the arbiter acted *ultra vires* in employing an expert to survey and report—is not maintainable. An arbitrator is not bound to examine witnesses, and cannot, by the law of England, insist upon their being examined on oath, unless the submission provides for it. By the 31st section of the above-mentioned Act [the Lands Clauses (Scotland) Act] he may, but is not bound to, examine the parties and their witnesses on oath, nor is he prevented from consulting men of science in every department where it becomes necessary. So, he has a power to call in a valuer to assist him, unless restricted by the terms of the submission”: *per* Lord Wensleydale in *Caledonian Ry. v. Lockhart* (1860), 3 Macq. H. L. at p. 823.

(3) Where the arbitrators, in the course of the reference, found it indispensable that they should be fully and properly advised upon questions of law which arose, and accordingly obtained opinions upon certain points of law:—*Held*, that they had acted rightly, and that their so doing afforded no ground for setting aside the award: *Rolland v. Cassidy* (1888), 13 App. Cas. 770.

(c) The arbitrators or umpire *must* give the parties the opportunity of being heard and tendering evidence.

Illustration.

H. and others having failed to agree with a railway company as to the amount of compensation to be paid, the matter was referred to arbitration. The reference was begun, all parties being present on the first day; but on the second day the company's arbitrator failed to attend. The other arbitrator and the umpire (who also was present

although the time for him to act had not yet come) sent the absent arbitrator notice of their intention to proceed, and a witness was examined on behalf of the claimants, but no evidence was adduced by the company. The company gave notice to the arbitrators and umpire not to make an award. The time for the arbitrators to make their award having expired, the claimants called upon the umpire to make his award, which he did without hearing any evidence except that given by the witness above mentioned. The company moved to set aside the award :—*Held*, that the award thus made, in the absence of and without notice to one of the parties, was void : *In re Hawley and North Staffordshire Ry.* (1847), 5 Rail. Cas. 383.

(d) If due notice of meeting is given and one party refuses to attend or leaves the meeting, the arbitrator or umpire may proceed *ex parte*.

Illustrations.

(1) An arbitrator made an appointment for a meeting. One of the parties, under a mistaken notion that there would be notice of another meeting before an award was made, went away without tendering evidence or intimating that he intended to offer it. The arbitrator thereupon proceeded *ex parte* and made his award :—*Held*, that he was entitled to do so : *Tryer v. Shaw* (1858), 27 L. J. Ex. 320.

(2) An umpire, under the Lands Clauses Act, gave due notice of a meeting. One of the parties refused to attend ; the umpire therefore proceeded *ex parte*, and made an award, but the party refusing to attend was afterwards let in upon condition of paying all the costs incurred, as she ought to have attended and given reasons for desiring delay : *In re Hewitt and Portsmouth Waterworks* (1862), 10 W. R. 780.

Arbitrator or Umpire to make a Declaration.

33. Before any Arbitrator or Umpire shall enter into the Consideration of any Matters referred to him, he shall in the Presence of a Justice make and subscribe the following Declaration ; that is to say,

‘ I *A.B.* do solemnly and sincerely declare, That I will faithfully and honestly, and to the best of my Skill and Ability, hear and determine the Matters referred to me under the Provisions of the Act [*naming the Special Act*]. *A.B.*
‘ Made and subscribed in the Presence of .’

And such Declaration shall be annexed to the Award when made ; and if any Arbitrator or Umpire having made such Declaration shall wilfully act contrary thereto he shall be guilty of a Misdemeanor.

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I. The declaration required by this section need not be made before a justice of the district or place where the lands in respect of which compensation is claimed are situate.

Illustration.

A claim having been made by one D. in respect of certain lands in Staffordshire, arbitrators were appointed under sect. 25 of the Lands Clauses Act. An umpire was appointed under sect. 28 of that Act, and he subscribed the declaration required by sect. 33 before a metropolitan police magistrate:—*Held*, that it was unnecessary that the declaration should be subscribed before a justice of the particular locality in which the lands were situate: *In re Davis and South Staffordshire Ry.* (1851), 15 Jur. 1133.

II. An umpire need not make the declaration before the arbitrators have performed any part of their functions. It is enough if he makes the declaration before exercising any part of his own functions.

Illustration.

A company appointed an arbitrator on March 23rd; the claimant another on April 6th. The arbitrators neglected, seven days after request by the company, to appoint an umpire, and he was eventually appointed by the Railway Commissioners on May 17th. The umpire and arbitrators made their declarations under sect. 33 on May 27th before the umpire entered upon the matters referred:—*Held*, that no objection arose from the lateness of these declarations: *In re Bradshaw and East and West India Docks, &c.* (1848), 12 Q. B. 562.

III. A declaration is unnecessary where the reference is not wholly under the Lands Clauses Act.

Illustration.

A submission to arbitration related to matters besides that of compensation claimed under the Lands Clauses Act, and was therefore not within the provisions of that Act. The arbitrator appointed did not make the declaration required by sect. 33 of the Act:—*Held*, that his award could not be set aside on that ground: *In re Levick and Epsom and Leatherhead Ry.* (1859), 1 L. T. 60.

IV. Like the other requirements of the Act in relation to arbitration proceedings, the necessity for the declaration required by this section may, it seems, be dispensed with by consent.

Illustration.

“The arbitration clauses being introduced for the benefit of the parties, they are at liberty to renounce at their pleasure the advantages which these clauses afford”: *per* Mellor, J., in *Palmer v. Metropolitan Ry.* (1862), 31 L. J. Q. B. at p. 260.

Costs of
Arbitration how
to be borne.

34. All the Costs of any such Arbitration, and incident thereto, to be settled by the Arbitrators, shall be borne by the Promoters of the Undertaking, unless the Arbitrator shall award the same or a less Sum than shall have been offered by the Promoters of the Undertaking, in which Case each Party shall bear his own Costs incident to the Arbitration, and the Costs of the Arbitrators shall be borne by the Parties in equal Proportions.

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I. The interpretation and application of the section.

Illustrations.

(1) "The object of the Act was that the compensation for the land taken should be awarded in the first instance, and that wholly irrespective of any question as to what offer had been made for it, or what costs had been incurred; and the arbitrators or the umpire were by their award simply to determine the amount of compensation": *per* Pollock, C.B., in *Gould v. Staffordshire Waterworks* (1850), 6 Rail. Cas. at p. 573. "The arbitrators or umpire have no power in the first instance to inquire what was the amount of the previous tender, or anything beyond the compensation to be made; each question is to be determined separately, the intention of the Legislature being that, so soon as it becomes necessary that the costs of the arbitration should be determined by the arbitrators, they shall have power to tax and settle them by a separate assessment": *per* Parke, B., at p. 575, *ib.*

(2) "It has been argued that there is a difficulty in applying that 34th section to this particular case, because . . . the manner of appointing the arbitrator in this case is not that which was contemplated by the 25th section of the Lands Clauses Act, and because the 34th section has in it the word 'such,' saying that, in case of 'such arbitration,' the costs should be paid by the company. Now, when your lordships look at the 25th section, you find that the provisions which follow are to take effect 'when any question of disputed compensation by this or the

special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen'; and the word 'such' in the 34th section refers to any arbitrations which may fall within that description. . . . If you did not apply the 34th section, there would be in this case an unexplained departure from the universal principle, founded, not upon any arbitrary policy, but upon natural reason and justice, according to which the Legislature has been accustomed, in Acts belonging to the class of which this is one, to provide that if compulsory powers are exercised against the owners of property for some object considered to be of sufficient importance to justify it, the costs either shall necessarily be, or at least in the judgment and discretion of some authority trusted by the Legislature may be, paid, so as to indemnify the person against whom those compulsory powers are exercised": *per* Lord Selborne, in *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. at p. 432; see *Martin v. Leicester Waterworks*, p. 205, *ante*.

II. Quantum of costs recoverable under sect. 34.

(a) The costs of the award are part of the costs of the arbitration.

Illustration.

"Common sense suggests that the power over the costs of the reference includes a power to give the costs of the award. If no award were made, the reference would never be finished": *per* Field, J., in *In re Walker and Brown* (1882), 9 Q. B. D. at p. 435.

(b) The costs of a special case stated by an arbitrator are costs incidental to the arbitration.

Illustration.

Upon the argument of a special case stated by an arbitrator under the Waterworks Clauses Act, it was contended that the costs of the special case were costs of and incidental to the arbitration, and therefore payable by the promoters under sect. 34:—*Held*, that the costs of such special case were costs incidental to the arbitration, within the meaning of sect. 34, and were therefore costs over which the Court of Appeal had no jurisdiction: *In re Holliday and Wakefield Corporation* (1888), 20 Q. B. D. 699. "The costs incidental to such an arbitration are the costs of whatever matters are done incidental to the arbitration, according to the powers which the Legislature from time to time may vest in the arbitrator: *per* Fry, L.J., at p. 720, *ib*."

(c) Sched. I. (i.) of the Arbitration Act also provides that "the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client." This provision will only apply where for any reason the provisions of sect. 34 of the Lands Clauses Act do not govern the question.

(d) The claimant is entitled to costs only which are incidental to that part of his claim in respect of which compensation has been awarded.

Illustrations.

(1) A landowner claimed compensation—(1) as to land taken; (2) as to prejudicial affection of other land. The umpire made an award as to (1), but found there was no damage as to (2):—*Held*, that the owner was entitled to those costs only of the arbitration which were incident to that part of the claim with respect to which compensation had been awarded: *R. v. Biram* (1852), 17 Q. B. 969.

(2) One part of a claim for compensation was held to be good; another part of the claimed failed;—*Held*, that the claimant was not entitled to costs in respect of the latter head of claim: *Sharpe v. Metropolitan District Ry.* (1879), 4 Q. B. D. 645. "I cannot think that if a plaintiff has two distinct heads of claim, upon which he goes to arbitration and wholly fails in one and succeeds in the other, he is entitled to recover, by virtue of the statute, the costs incurred in that arbitration upon the separate claim upon which he is unsuccessful": *per* Brett, L.J., at p. 652, *ib.*

NOTE.—This case went to the House of Lords, as *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. 425, but this point was not dealt with.

(e) The claimant is not entitled to the costs of the arbitration if the arbitration and award are *ultra vires*.

Illustration.

In 1839 land was sold to a railway company under Acts which provided (*inter alia*) that minerals were to be deemed to be excepted out of the purchase of the lands. By an Act of 1846 the earlier Acts were repealed, but no conveyance, act or thing was to be prejudiced by the repeal. The Act also incorporated the Lands Clauses Act and part of the Railways Clauses Act. In 1894 W. gave the company notice of his intention to work the minerals under land adjacent to that conveyed. The company gave counter-notice of their intention to purchase a part, and W. claimed compensation for the part purchased, and for injurious affection of the remainder. The company attended the arbitration, afterwards held, under protest:—*Held*, that the effect of the proviso in the Act of 1846 was that the mining rights were regulated by the conveyance, and that the substitution for the repealed Acts of the Railways Clauses Act would have the effect of altering the conditions on which the minerals were reserved to the vendor; that the arbitration and award were *ultra vires*, and that W. was not entitled either to the sum awarded or to the costs of the arbitration: *London and North-Western Ry. v. Walker*, [1903] A. C. 289.

(f) When the award is silent as to the costs of the arbitration, and the special provisions of the Lands Clauses Act as to costs do not apply, the claimant cannot recover any.

Illustrations.

(1) A company's Act provided for the reference of disputes as to compensation to a jury, and directed that when a verdict should be given for the same or a larger sum than that previously offered by the company, the costs of summoning the jury, and of the bond to be given by the party requiring the jury, should be defrayed by the company; but if the verdict should be for less than the sum offered, then half of such costs should be paid by the claimant, and the other half by the company. R. having certain claims against the company, agreed to submit them to an arbitrator instead of having them settled by a jury. The deed of submission was silent as to the costs of reference. The arbitrator awarded R. a sum by way of compensation, but the award was silent as to costs:—*Held* that, although the award was in favour of the claimant, the provisions of the

Act as to costs did not apply, and R. could not recover any : *Ex parte Reynal* (1847), 5 Rail. Cas. 60.

(2) C. having petitioned against a Bill promoted by the G. N. Railway Co., the company entered into an agreement with him, in consideration of his withdrawing his opposition to the Bill, for the purchase of his leasehold interest in certain property, and also to pay compensation for damage to adjacent property belonging to C. and for loss of profits. The Act passed, and C.'s claim was referred to an arbitrator. An award was made in C.'s favour for a large sum, but nothing was said therein as to costs:—*Held* that, as the agreement was made before the company had obtained their Act, the provisions of the Lands Clauses Act did not apply, and, as the arbitrator had not dealt with the matter of costs, C. was not entitled to recover any : *Catling v. Great Northern Ry.* (1869), 21 L. T. 769.

(g) Where the award is silent as to costs, but the company have agreed to pay interest from a certain date, *e.g.*, the date of taking possession, and the amount awarded as compensation, with the addition of the interest, exceeds the amount of a tender made “in full of all claims of every description,” the owner is entitled to the costs of the arbitration.

Illustration.

A company entered into possession of land on August 9th, 1898, and agreed to pay the owner interest at 5 per cent. from that date, “on the amount of his compensation when ascertained or agreed on.” On March 21st, 1902, the umpire fixed the compensation at 1,265*l.* with interest at the rate agreed on from August 9th, 1898, which thus made the money value as at the date of the award 1,490*l.* The award said nothing as to costs. The company having at an early stage of the proceedings tendered to the owner's agent 1,300*l.* “in full of all your client's claims of every description, in respect of his right and interest as proprietor in the land . . . taken,” contended that they were not liable for the costs of the arbitration as their tender exceeded the sum awarded as compensation :—*Held*, that as the tender must be read as having been made in full of all claims of every kind, which would include interest, and that as, including interest, the amount awarded exceeded the tender, the company were liable for the costs : *Riddell v. Lanarkshire and Ayrshire Ry.* (1904), 6 Ct. of Sess. Cas. (5th series) 432.

(h) Surveyors employed are not entitled as a matter of custom to a percentage on the amount awarded.

Illustration.

There is no custom that surveyors engaged in compensation cases are entitled to be remunerated by a percentage on the sum awarded : *Debenham v. King's College, Cambridge* (1884), 1 C. & E. 438.

(k) Costs incurred by a landowner in connection with a local inquiry cannot be allowed.

Illustration.

The Secretary of State under the powers of the Military Lands Act, 1892, acquired land belonging to P. Compensation was awarded to P. greater than the sum offered. The costs were referred to a taxing master under the Lands Clauses (Taxation of Costs) Act, 1895. The taxing master allowed costs incurred by P. in connection with the local public inquiry held in pursuance of sect. 2 of the Act of 1892. It was *held*—(1) that the taxing master

had no jurisdiction to allow these costs; (2) that the function of the taxing master was ministerial and not judicial, and therefore his certificate could not be quashed on *certiorari*: *R. (Secretary of State for War) v. Goff*, [1905] 2 I. R. 121.

III. Sect. 34 applies to proceedings under sect. 68.

Illustration.

"The 68th section must of necessity refer to the previous provisions with respect to arbitration, and among them there is a clause (34) which provides for the costs of the arbitration": *per* Parke, B., delivering the judgment of the Exchequer Chamber in *South-Eastern Ry. v. Richardson* (1855), 15 C. B. at p. 820.

IV. The relation of sect. 34 to sect. 51 (*post*).

Illustrations.

(1) A claim for compensation being made against a company, a jury was summoned in accordance with the Lands Clauses Act and an inquiry duly held before them and an under-sheriff. Afterwards, the Queen's Bench Division, upon the application of the claimants, quashed the inquisition, verdict and judgment, on the ground of misdirection of the jury; and a fresh inquiry before another jury, which had been summoned under the same warrant, took place, and resulted in a verdict in favour of the claimants. No objection was made by the company's solicitor to the summoning of the second jury under the same warrant:—*Held*, that the words "such inquiry" in sect. 51 mean the inquiry in which the jury have found a good verdict, and that the claimants were entitled to the costs of both hearings: *R. v. North London Ry.* (1881), 51 L. J. Q. B. 241. Hawkins, J., said: "It could never have been contemplated by the Legislature that a claimant should pay the costs of an inquiry rendered abortive by an untenable objection."

(2) Certain land of which T. was the lessee being required by a railway company, notice to treat was given him, and compensation was duly assessed by a jury, but before this event took place T. agreed with the company to sell to them the land required for the sum of 1,500*l.*, which was to include not only the value of T.'s interest, but also compensation for all damage by severance and injury to T.'s adjacent property. Injury having afterwards been caused to T.'s property through subsidence which was the result of the execution of the railway works, T. obtained an assessment by inquisition under sect. 68. and afterwards brought an action to recover the amount of the taxed costs of the inquisition. To this the company pleaded satisfaction and discharge under the agreement:—*Held*, that the provisions of sect. 51, whereby the costs of the inquiry before a jury are to be borne by the promoters when the jury have found for a sum larger than that previously offered by the promoters, do not apply to a case where no offer has been made, and where the promoters are not liable at all: *Todd v. Metropolitan District Ry.* (1871), 24 L. T. 435. With regard to this decision, Cotton, L.J., said, in *Capell v. Great Western Ry.* (1883), 11 Q. B. D. at p. 350: "As regards the case of *Todd v. Metropolitan District Ry.*, that was a case under sect. 68 of the Lands Clauses Consolidation Act, 1845, where it is not the railway company but the landowner who commences proceedings by serving the notice, and where the claim for compensation being for land said to be injuriously affected, the person who puts the machinery of the Act in motion may fail in establishing his claim, and so it may be quite right that he should not have the costs of the inquiry."

V. As to conditions of and time for offer.

See sect. 38, *post*.

VI. Taxation of costs.

(a) There can be no taxation by a master when the parties, instead of proceeding in the manner provided by the Lands Clauses Act, have made provisions as to costs in the agreement between them.

Illustrations.

(1) An agreement between a public authority and Messrs. D. provided for the conveyance of certain land by the former to the latter, and other matters, and also for the determination of the amount of damages by arbitration and for the payment of all costs by the public authority:—*Held*, that sect. 1 of the Lands Clauses Act, 1869 (as to taxation of costs), applied only to arbitrations proceeding entirely within the provisions of the Lands Clauses Act, and not to a case like the present: *In re Doulton and Metropolitan Board of Works* (1870), L. R. 5 Q. B. 333.

NOTE.—See sect. 1 of the Lands Clauses (Taxation of Costs) Act, 1895 (*post*), which has virtually re-enacted sect. 1 of the Lands Clauses Act, 1869.

(2) A corporation having given W. notice to treat, he sent in particulars of his claim and interest and appointed M. as his arbitrator. The corporation thereupon appointed L. as their arbitrator, and an umpire was nominated. Before the hearing, however, W. agreed to give immediate possession, the corporation to pay W. interest and all costs incidental to the agreement, arbitration and conveyance of the lands as between solicitor and client, and the time for making the award was extended. The bill of costs having been delivered after the award was made, the corporation applied to have it taxed:—*Held* that, the parties having contracted themselves out of the Lands Clauses Act, no order could be made for taxation by a master: *Wombwell v. Barnsley Corporation* (1877), 36 L. T. 708.

(b) Where the promoters are directed by the umpire to pay the costs of the award, including the costs of preparing the same by a solicitor, they are entitled to have the solicitor's bill of costs taxed.

Illustration.

A waterworks company requiring certain land, the vendor's claim was referred to arbitration, and the umpire awarded that the company should pay the costs of the award, including the costs of preparing the award. The company took up the award and paid the amount fixed by the umpire, which included the charge made by a solicitor for drawing up the award. The company applied in the King's Bench Division for an order for taxation of the solicitor's bill of costs under the Solicitors Act, 1843:—*Held*, that there was a liability on the company to pay these charges of the umpire's solicitor, and although these charges were paid before the application for taxation, there were special circumstances within sect. 41 of the Solicitors Act, 1843, because when the award was taken up it was impossible to predicate what the effect of the award would be. The taxation, however, must be in the Chancery Division: *In re Collyer-Bristow*, [1901] 2 K. B. 839.

(c) The Court will not grant a *mandamus* or writ of *certiorari* to the taxing master to review his taxation, nor will the Court issue directions to the taxing master, but when the master states the principle of his taxation, the Court will in a proper case review it.

Illustrations.

(1) The King's Bench in Ireland will not grant a *mandamus* to the master of the Court commanding him to review his taxation of costs under the Lands Clauses Act: *In re Scully and Great Southern and Western Ry.* (1848), 11 Ir. L. R. 292.

(2) The Corporation of B. executed works under the powers of an improvement Act which incorporated the Lands Clauses Act. E. brought an action against the corporation for an injunction and damages for trespass. At the trial by consent a verdict was taken for the plaintiff for 40s. damages and 40s. costs, and an order of *nisi prius* was drawn up by consent referring to an arbitrator to find the amount of compensation to be paid by the corporation, and directing that the costs of the reference and award should be paid by the corporation. The master taxed the costs of the reference and award on the ordinary scale between party and party. E. obtained a rule *nisi* for the corporation to show cause why the costs should not be taxed as costs in proceedings under the Lands Clauses Act:—*Held*, that the meaning of the order as consented to by the parties was that the costs were to be taxed on the ordinary scale as between party and party; *held also*, that the Court would decline to interfere with the master by giving directions how to tax, but that after taxation parties might come to the Court and ask to have the taxation reviewed: *Eccles v. Blackburn Corporation* (1861), 30 L. J. Ex. 358.

(3) The costs of an inquiry before arbitrators under the Lands Clauses Act, 1845, were taxed and settled by a taxing master, under sect. 1 of the Lands Clauses Act, 1869:—*Held*, that the Court has no jurisdiction over the master's taxation on a motion to review: *In re Sandback Charity Trustees and North Staffordshire Ry.* (1877), 3 Q. B. D. 1. "There is no ground for an application for a *mandamus*, for the master has not declined jurisdiction, neither can the Court grant a writ of *certiorari*, because the master has jurisdiction and has exercised it": *per* Bramwell, L.J., at p. 3, *ib*.

(4) Where, upon the assessment of compensation by an under-sheriff and a jury, it was shown that the interest of the claimant was only that of a tenant from month to month, it was sought to quash the inquisition on the ground of want of jurisdiction and thus prevent the claimant from getting his costs of the inquisition:—*Held*, that a rule for a *certiorari* must be refused and that the proper course would be to give notice to the taxing master to stay the taxation: *In re London School Board*, "Times," March 1st, 1892; see also *R. v. Goff*, *ante*, p. 228.

(d) Taxation is not necessary before an action to recover costs.

Illustrations.

(1) Direction by an arbitrator that the costs of a certain action, reference and award should be paid by the defendant. Breach—non-payment. Plea—that they were not, before action, ascertained or taxed. On demurrer:—*Held*, that the award was good and the plea bad: *Lewis v. Rossiter* (1875), 44 L. J. Ex. 136.

(2) "The costs are not created by taxation, nor is the legal right to recover them created by taxation. The right to recover them is given by the statute; the costs have been actually incurred, and in other cases of costs which are subject to taxation it is not generally a condition precedent of a demand, or of an action brought upon a demand for costs, that the costs should have been taxed. 'Settlement' or taxation is merely a mode of determining in a *quasi-judicial* manner, by a ministerial officer of the Court, disputed questions of amount when they arise": *per* Lord Selborne, *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. at p. 435.

(e) The taxing master's certificate as to the costs of the arbitration proceedings is not evidence against the arbitrators or umpire as to the reasonableness of the amount of their fees, and in the absence of evidence that the fees charged are unreasonable or extortionate the Court will not interfere with them.

Illustration.

An action was brought by the plaintiffs to recover money paid for the fees of the arbitrators and umpire in an arbitration under the Lands Clauses Act. The defendants declined to submit particulars of their fees to the taxing master, who thereupon disallowed a part. The question was whether the fees were reasonable :—*Held*, that the parties must be taken to have intended the natural result of employing as arbitrators and umpire gentlemen of eminence in their profession, and as the fees charged were such as would have been stipulated for if the arbitrators and umpire had been asked to make a bargain, it could not be said that the fees were unreasonable ; *held further*, that *prima facie* a Court of law is not the proper tribunal for determining the amount of an arbitrator's or umpire's remuneration ; *held also*, that the taxing master's certificate of the costs of the arbitration proceedings was not evidence against the arbitrators and umpire that the fees charged were unreasonable : *Llandrindod Wells Water Co. v. Hawksley* (1904), 20 T. L. R. 241.

(f) The umpire ought to fix his costs and those of the arbitrators in separate sums.

Illustration.

An umpire fixed one sum for his and the arbitrators' costs. It was *held* that they should have been stated separately : *In re Gilbert and Wright* (1903), 20 T. L. R. 164.

(g) As to adoption of award by landowner, *see* the following case :—

Illustration.

An award of compensation for land entered upon to obtain materials did not fix the costs. The landowner applied to have the compensation, which had been paid into court, invested, and, in addition to the amount awarded and the taxed costs, to be paid costs of keeping accounts of the materials :—*Held*, that by applying for investment he had adopted the award and was bound by it : *Ex parte Harrison* (1849), 13 Jur. 381.

VII. A claimant to whom compensation has been awarded is entitled to have his costs paid within a reasonable time after the award or verdict without regard to the execution of the conveyance by him.

Illustration.

Notice to treat having been given to, and compensation claimed by, C., the amount due to him was determined by arbitration, and the costs were awarded him. These costs were taxed, but although the defendant company had accepted C.'s title to the land, the conveyance was not executed until after C. had brought his action to recover the costs :—*Held*, that C. was entitled to have his costs paid within a reasonable time after the arbitration, without regard to the execution of the conveyance by him : *Capell v. Great Western Ry.* (1883), 11 Q. B. D. 345.

VIII. Lien for costs.

See sect. 6, *ante*, p. 69.

35. The Arbitrators shall deliver their Award delivered to the Promoters of the Undertaking, in Writing to the Promoters of the Undertaking, and the said Promoters shall retain the same, and shall forthwith, on demand, at their own Expense, furnish a Copy thereof to the other Party to the Arbitration, and shall at all Times, on demand, produce the said Award, and allow the same to be inspected or examined by such Party or any Person appointed by him for that Purpose.

NOTE.—The tribunal by which compensation is assessed has no power to consider any question of legal liability or of title, but can only deal with the *quantum* of compensation (see *ante*, p. 179).

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I. Enforcing the taking up of the award.

(a) When the award has been made, the promoters are, by this section, under an obligation to take up the same, which obligation may be enforced by the prerogative writ of *mandamus*.

Illustrations.

(1) A railway company, acting under statutory powers, took lands of A., who desired that the question of compensation might be referred to arbitration. An umpire was appointed by the Board of Trade under sect. 28 of the Lands Clauses Act, and an award was duly made. The company did not take up the award :—*Held*, that it was obligatory upon the company to take up the award, and that a *mandamus* lay to compel them to do so : *R. v. South Devon Ry.* (1850), 15 Q. B. 1043.

(2) H. claimed compensation for lands alleged to be injuriously affected by certain railway works, and gave notice in writing to the company of his desire to have the same settled by arbitration under sect. 68 of the Lands Clauses Act. Arbitrators were in due

course appointed, and made an award. H. then moved, under sect. 35 of the Act, that the company might be ordered to take up the award within four days, and at their own expense, and furnish H. with a copy. The Court made the order: *Ex parte Harper, In re Great Eastern Ry.* (1874), 23 W. R. 67.

(3) The owners of certain coal mines which underlay the P. and U. Junction Railway, belonging to a railway company, gave notice to the railway company of their intention to work these mines, whereupon the company marked out upon plans delivered by them certain pillars of coal, the working of which they deemed likely to damage the railway, and required the mine-owners not to work the same, and notified their readiness to treat with the mine-owners for the purchase thereof. Arbitrators having been appointed and having failed to agree, an umpire was nominated, who gave notice that his award was ready. The railway company having refused to take up the award, application was made for a prerogative writ of *mandamus*:—*Held*, that the arbitration was under the Lands Clauses Act, and that such writ was the appropriate remedy for compelling the taking up of the award: *R. v. London and North-Western Ry.*, [1894] 2 Q. B. 512.

(4) W., the owner of minerals under and adjoining the N. W. Company's railway, having given the company notice of his intention to work the minerals, the company gave W. notice of their intention to purchase part of the minerals. W. then gave the company notice of the amount of his claim, and required the compensation to be settled by arbitration under the Lands Clauses Act. W. appointed his arbitrator, and called upon the company to appoint theirs. The company objected on the ground that the assessment of the compensation was regulated by a special Act of the company, and not by the Lands Clauses and Railways Clauses Acts, but eventually appointed an arbitrator under protest, and repudiating the jurisdiction of the arbitrators. The arbitrators not being able to agree in the choice of an umpire, the Board of Trade appointed an umpire in accordance with the Lands Clauses Act. The company appeared at the arbitration under protest and asked the umpire to make an alternative award under their special Act, contending that he had no jurisdiction under the Lands Clauses Act. The umpire refused to do so. When the umpire made his award the company refused to take it up, and W. obtained a rule *nisi* for a *mandamus*:—*Held*, that the railway company were bound to take up the award and furnish a copy to the claimants in accordance with sect. 35 of the Lands Clauses Act; and that a *mandamus* should be granted to compel them. The validity of the award might be contested at a later stage: *London and North-Western Ry. v. Walker*, [1900] A. C. 109.

(b) It is a good return to a writ of *mandamus* to take up an award that the claimant has accepted a sum in full satisfaction of his claim for compensation.

Illustration.

Mandamus to a railway company reciting that premises of which B. was the occupier had been injuriously affected by the company's works, in respect of which B. claimed compensation, and appointed his arbitrator, who, failing the appointment of an arbitrator by the company, proceeded to hear the case and make his award, which latter the company refused to take up. The company made a return to the writ averring that B. also occupied other lands, which were taken by the company, and that, before the execution of their works, it was agreed between B. and the company that the latter should pay the sum of 22*l.* 10*s.* in full satisfaction of B.'s claim with respect to the lands taken, and of the premises injuriously affected, which sum was duly paid:—*Held*, that this was a good return: *R. v. West Midland Ry.* (1863), 11 W. R. 857.

NOTE.—*R. v. Cambrian Ry.* (1869), L. R. 4 Q. B. 320, is sometimes cited in support of the proposition that it is a good return to a *mandamus* to take up an award for the

promoters to show that the claimant has no claim to compensation. The case, however, is not really an authority for any such broad proposition, for there the decision proceeded on a demurrer which admitted the truth of the return by the promoters that the claimant's interest in the property had not been injuriously affected. In commenting upon that case in *R. v. London and North-Western Ry.*, [1899] 1 Q. B. 921 (which was affirmed *sub nom. London and North-Western Ry. v. Walker, supra*), A. L. Smith, L.J., said (at p. 933): "The prosecutors admitted that they were entitled to nothing. Then, what right had they under sect. 35 to have the award taken up by the company and a copy of it handed to them to see what it was?" See also *London and North-Western Ry. v. Walker (supra)*, where it was said that the promoters must take up the award, the validity of which might be contested at a later stage. *R. v. Cambrian Ry.* only decides that it is a good return for the promoters to show that the claimant is not entitled to compensation *when this is admitted by the claimant in the proceedings for the mandamus*.

In *R. v. West Midland Ry.* (1862), 10 W. R. 583, where the promoters refused to appoint an arbitrator and the claimant's arbitrator proceeded to make an award which the company refused to take up, the Court was doubtful under the circumstances whether the company were really parties to the reference so as to be compellable to take up the award, but the *mandamus* was allowed to go as the question might be raised on the return (see the case on the return, *supra*).

(c) If instead of pursuing his rights under sect. 35 the owner himself pays the arbitrators' or umpire's fees and takes up the award, he cannot recover the sums so paid in an action against the promoters.

Illustration.

A railway company gave notice to S. to take certain lands of his. The question of compensation was referred to arbitration, and the umpire made his award for a sum much larger than that offered by the promoters. Instead of pursuing his rights under sects. 34 and 35 of the Lands Clauses Act, S. paid the umpire's fees and took up the award:—*Held* that, as there was no obligation upon S. to pay any part of the costs (including the umpire's fees), he could not recover from the promoters the amount paid by him: *Shrewsbury (Earl) v. Wirral Rys. Committee*, [1895] 2 Ch. 812.

II. Setting aside award.

(a) If it appears on the face of an award that the arbitrator has included a decision on some matter not submitted, or omitted to decide some matter submitted, to him, the award will be set aside.

Illustrations.

NOTE.—The following cases are not exhaustive of the subject, but are illustrations of cases arising under the Lands Clauses Act.

(1) Where, in a valuation, it did not appear that a valuer under sect. 85 of the Lands Clauses Act had taken into account the damage by severance under sect. 63, the valuation was *held* bad: *Barker v. North Staffordshire Ry.* (1847), 12 Jur. 324.

(2) Upon receipt of a notice to treat, C. W. and R. W. gave a company notice of their interests in the land required, for which they claimed 2.280*l.* as compensation for purchase-money and damage, and exercised their option in favour of going to arbitration. At the

hearing before the umpire, C. W. and R. W. gave evidence of the value of certain small pieces of land which, being severed by the works of the company, C. W. and R. W. contended the company were bound to purchase. The company's representatives objected to this evidence; but the umpire accepted it, and awarded that the company should pay 1,444*l.* to C. W. for the purchase of the fee-simple, the copyhold and leasehold interest, and that the further sum of 732*l.* should be paid to C. W. and R. W. as compensation for the damage sustained by the execution of the works and of the severing or otherwise injuriously affecting the land:—*Held*, that the award was bad, as nothing had been submitted but the value of the land *required by the company*: *In re North Staffordshire Ry. and Wood* (1848), 17 L. J. Ex. 354.

(3) A railway company requiring certain lands, gave notice to treat to L., H. and S. L. and H. gave notice to the company that, as the trustees of F., they had an "estate and interest" in the lands and claimed 3,344*l.* for the same, and elected to go to arbitration and appointed T. their arbitrator. The matter was afterwards heard by the umpire selected. At the reference one W. claimed compensation, alleging that he had an agreement for the renewal of an unexpired term. The umpire made an award in favour of L. and H.:—*Held*, that the umpire ought to have made separate awards in favour of L. and H. and of W.: *North Staffordshire Ry. v. Landor* (1848), 6 Rail. Cas. 17.

(4) A. agreed to let, and B. agreed to hire, a piece of land containing about fifteen acres, at an annual surface rent—B. was to use the land for brick-making, and to pay to A. three shillings per 1,000 on the quantity made, the quantity made to be not less than 4,000,000 yearly, the ground not to be dug below eight feet without the special permission of A. in writing. Part of the land being required by a railway company, B.'s claim for compensation, and for deterioration to the part not taken, was referred to arbitration. The umpire found that B.'s interest was merely that of tenant from year to year, and assessed compensation upon that basis:—*Held*, that the construction put by the umpire upon the agreement was correct, and that evidence tending to show that by the custom of the brick-making trade brick-land is never hired from year to year, was properly rejected. *Quære*, whether the Court had power to interfere, even if the decision of the umpire had been wrong: *In re Stroud* (1849), 8 C. B. 502.

(5) A railway company having statutory powers to abandon certain tramways which communicated with B.'s ironworks, and having given B. notice of their intention to take certain lands, the question of the amount of compensation was referred to an umpire, who was to ascertain and direct what should be paid "for the interest in the lands and any damage that might be sustained by reason of the execution of the works." B. made a claim before the arbitrator for compensation in respect of damage which he would sustain through the stopping-up of the tramways, and the umpire awarded that a sum should be paid him "as and for purchase and compensation for and in respect of his interest in the said lands and hereditaments and for damage sustained and which may be sustained by him by reason of the execution of the works of the said railway or the exercise by the said company of the powers of the said Act":—*Held*, that it did not appear upon the face of the award that the umpire had exceeded his jurisdiction by awarding compensation in respect to a claim of damage not within the reference: *In re Brogden and Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229.

(6) By a submission, the umpire chosen was to determine "what consideration or other sums or sum of money was or were the value, and should be paid by the S. H. trustees for the absolute purchase by them in fee simple in possession of the said lands . . . described in the schedule thereunder written, and *what other, if any*, sum or sums of money should be paid by the said trustees as or by way of compensation for or in respect of the damage or injury, if any, to be sustained by the said Duke of B. by reason of the severing of the same lands . . . from the other lands of the said Duke or otherwise injuriously affecting such other lands by the exercise" of statutory powers. The umpire in his

award, after reciting the submissions and that he had considered the matters referred, awarded a sum for the purchase of the land, but said nothing as to damage for the severance :—*Held*, a good award, for it must be deemed that the umpire, by his silence, negatived any right to compensation for severance : *In re Beaufort (Duke) and Swansea Harbour* (1860), 29 L. J. C. P. 241.

(7) A railway company having given the plaintiff notice to treat, he agreed with the company to refer to arbitration the determination of the value of the premises, “and the damages sustained or to be sustained by the plaintiff, by reason of the execution of the works of the company, and the amount of compensation to be paid by the company to the plaintiff in respect thereof.” An award was duly made by the umpire, but it determined the compensation only for the value of the property taken, and took no notice of the second subject-matter of reference :—*Held*, that the award was bad : *Wakefield v. Llanelly Ry.* (1865), 34 Beav. 245.

(8) At an arbitration the umpire disregarded the order of reference, under which he had no jurisdiction to inquire into the legal rights of the claimants, or how far their position was affected by the covenants contained in their lease, but only to assess the amount of compensation (if any) due to the claimants :—*Held*, that the award must go back to the umpire : *In re Rhys and Dare Valley Ry.* (1868), L. R. 4 Ch. 554.

(9) T. was the owner of two adjacent villas, called E. Villa and W. Villa. Behind E. Villa there was a garden, at the back whereof was a strip of land which had been thrown into the garden of W. Villa. A railway company gave T. notice to treat in respect of E. Villa and the strip of land at the back which formed part of the garden of W. Villa. T. gave the company a counter-notice requiring them to take the whole of W. Villa. Thereupon the railway company gave notice abandoning their notice to treat; but T. contended that he was entitled to treat the notice given by the railway company, as being applicable to E. Villa without the strip of land at the back, and his arbitrator proceeded *ex parte* to assess the compensation as to E. Villa. T. afterwards sued for the amount awarded him, alleging that he was entitled to consider the notice to treat given by the railway company as being equivalent to two notices, a notice as to E. Villa and a notice as to that part of W. Villa which was behind E. Villa, and that the notice by the railway company abandoning their notice to treat had reference only to the latter, leaving T. the right to have compensation awarded as to the former :—*Held*, that there was only one notice to treat, and that T. was not entitled to treat the notice as being two notices applicable to E. Villa and part of W. Villa; that the award was therefore not binding on the railway company, and that T. was not entitled to recover : *Thompson v. Tottenham and Forest Gate Ry.* (1892), 67 L. T. 416.

(b) An award is not invalidated by the fact that compensation has been assessed in one sum in respect of two or more heads of claim or separate claims, as, *e.g.*, purchase-money and damages for severance. It is less likely, however, to give rise to difficulty if the amount awarded under each head of compensation is stated.

Illustrations.

(1) A company gave B. notice to treat as to a farmhouse and buildings and certain land belonging to him. The question of purchase-money and compensation was referred to arbitration, and one lump sum was awarded to B. in respect of purchase-money and compensation for severance and injurious affection :—*Held*, that the assessment of compensation in one lump sum did not invalidate the award, for the Lands Clauses Act

nowhere requires separate assessments in such circumstances : *In re Bradshaw and East and West India Docks Ry.* (1848), 12 Q. B. 562.

(2) A railway company requiring part of Messrs. B.'s lands gave them notice to treat for the same. It was referred to an umpire to ascertain what was due "for the interest in the lands, and any damage that might be sustained by reason of the execution of the works." The umpire awarded one sum for the "purchase and compensation in respect of their interest in the said lands and hereditaments, and for damage sustained and which may be sustained by them by reason of the execution of the works of the said railway or the exercise by the said company of the powers of the said Act" : *Held*, that the award was not invalid : *In re Brogden and Llynvi Valley Ry.* (1860), 9 C. B. N. S. 229.

(3) "So if there were several claims, the reference as to damages would be a reference of the claims or such of them as were enforceable at law. After the amount had been ascertained, if it included something that was not legally enforceable, the condition would come into operation, and the award would be bad if any one of the claims was not enforceable unless the damages were so assessed that the objectionable part could be severed from the rest" : *per* Willes, J., in *Beckett v. Midland Ry.* (1866), L. R. 1 C. P. at p. 241.

(c) An award will not be set aside for a mere error in matter of form or where the excess of jurisdiction on the part of the arbitrator or umpire is unimportant.

Illustrations.

(1) It is not a valid objection to an award that the umpire has assumed the claimant to be in possession, when, in fact, possession was held by a lessee : *In re Bradshaw and East and West India Docks Ry.* (1848), 12 Q. B. 562. "The answer is that such assumption, if actually made, is in his favour and to his advantage, and therefore no matter of complaint for him" : *per* Denman, C.J., at p. 573, *ib.*

(2) When the umpire stated in his award that he had heard and considered "the evidence produced by the said company and by the said J. S.," whereas, in fact, he had heard the evidence of J. S. only :—*Held*, that the award could not be set aside for a mere irregularity in matter of form : *Skerratt v. North Staffordshire Ry.* (1848), 5 Rail. Cas. 166.

(3) A claimant gave notice of his desire to have the question of compensation referred to arbitration ; and in the schedule of claim annexed to the notice were included certain pieces of land which the owners, under sect. 93 of the Lands Clauses Act, required the respondent company to purchase as lands severed by the works, the area of these being very small. The company then gave the claimant notice whereby, after reciting his notice, they appointed an arbitrator to whom was to be referred the amount of compensation to be paid to the claimant "for the purchase of the said lands." The arbitrators appointed an umpire, who received evidence of the value of the small area of land and awarded one sum for the purchase of the land required by the company and for the small pieces :—*Held*, that the award was bad, the question as to the small pieces being outside the reference ; but the Court refused to set aside the award, leaving the company to dispute it when it was attempted to enforce it : *In re North Staffordshire Ry. and Wood* (1848), 2 Ex. 244.

(4) Notice to treat having been served upon L., it was agreed to refer to W. T. to determine the value to be paid for the lands required and that the purchase-money should be paid within three days after the date of the award. W. T., by his award, found the value of the lands at a certain sum, and directed it to be paid within three days, subject to the payment of the purchase-money into court, as provided by the Lands Clauses Act :—*Held* that, even if the referee had exceeded his jurisdiction in ordering the money to be paid, the rest of the award was good : *Lindsay v. Direct London and Portsmouth Ry.* (1850), 1 L. M. & P. 529.

(5) A claim having been made under sect. 68 of the Lands Clauses Act, the umpire awarded H., the claimant, "the sum of 500*l.* as and by way of compensation for having, in the exercise of their Parliamentary powers, injuriously affected Nos. 43 and 44, Sun Street, to which the said T. E. Harper claims to be entitled." It was contended that the award was bad, inasmuch as it did not set forth that, "assuming that the company is liable to pay, I award that the company do pay such a sum": *Held*, that this omission was one of mere form, and did not constitute an excess of jurisdiction: *In re Harper and Great Eastern Ry.* (1875), L. R. 20 Eq. 39.

(d) An award will not be set aside upon the ground that the award is against the weight of the evidence.

Illustration.

"Even if the decision had been contrary to the evidence, that would not be any ground for the interference of this Court": *per* Erle, C.J., in *In re Bradshaw and East and West India Docks Ry.* (1848), 12 Q. B. at p. 573.

(e) An award will be set aside when the umpire or arbitrator has exceeded his jurisdiction or been guilty of misconduct (*see also* Russell on Awards).

Illustration.

"In cases where an award is good on the face of it, but the arbitrator has made a mistake, either of law or of fact, if that mistake has been as to a matter within the arbitrator's authority, then inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied, nor can the Court, even in its exercise of its equitable jurisdiction, set aside the award, unless it can be shown that there was misconduct or some other equitable ground for interference; and in the case of the verdict of a compensation jury, inasmuch as the *certiorari* is taken away there is no remedy at law at all unless there be excess of jurisdiction. But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction": *per* Blackburn, J., in *Buccleuch (Duke) v. Metropolitan Board of Works* (1870), L. R. 5 Ex. at p. 232; affirmed as to this L. R. 5 H. L. 418.

(f) It is not of necessity an objection to the award that, while the arbitration was pending, and before making his award, an arbitrator has given evidence on behalf of one of the parties in another inquiry as to the value of the land taken for similar purposes and under the same statutory powers.

Illustration.

The company gave the claimant notice to treat in respect of certain land. Arbitrators were appointed who selected C. as umpire, who eventually made an award. Prior to the hearing C. had been retained by the company as a witness for them in another inquiry as to the value of certain land belonging to one G., which was situated within a comparatively short distance of the claimant's land, and which was being taken by the company for the same purpose, and under the same statutory powers. About a week before making his award C. gave evidence as to the value of G.'s land:—*Held*, that the award was not bad on that ground: *In re Haigh and London and North-Western Ry.*, [1896] 1 Q. B. 649.

(g) Although it is highly improper, it is not of itself a ground for setting aside an award that the arbitrator has employed the solicitor of one of the parties (although his own solicitor also) to assist him in framing the award.

Illustration.

An arbitrator, who was a layman, consulted and was attended by one B., the attorney to one of the parties (B. being also the arbitrator's own solicitor) with regard to the award, in the absence of the other party to the reference; and the award was afterwards prepared by B., who had acted in the reference on behalf of one party:—*Held*, that the conduct of the arbitrator, although highly improper, did not justify the Court in setting aside the award: *In re Underwood and Bedford and Cambridge Ry.* (1861), 11 C. B. N. S. 442.

(h) Upon an application to set aside an award or refer it back for the consideration of the umpire, or to enforce it, the evidence of the umpire is admissible for the purpose of ascertaining (*e.g.*) what has been the course of the reference, what claims were made, and what admitted, but his evidence is not admissible to explain, much less to contradict, what is plain upon the face of the award.

Illustrations.

(1) "I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is mistake in point of subject-matter—that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award—or if there is a mistake in point of legal principle going directly to the basis on which the award is founded, these are subjects on which he ought to be examined, and also grounds for setting aside his award": *per* Giffard, V.-C., in *In re Rhys and Dare Valley Ry.* (1868), L. R. 6 Eq. at p. 435.

(2) "It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument with him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased. The award is a document which must speak for itself, and the evidence of the umpire is not admissible to explain or to aid, much less to attempt to contradict (if any such attempt should be made) what is to be found upon the face of that written instrument": *per* Lord Cairns in *Buccleuch (Duke) v. Metropolitan Board of Works* (1872), L. R. 5 H. L. at p. 462.

Submission may
be made a Rule
of Court.

36. The Submission to any such Arbitration may be made a Rule of any of the Superior Courts, on the Application of either of the Parties.

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Preliminary.—The provisions of sect. 36 should be compared with those of sect. 1 of the Arbitration Act, 1889, which provides as follows:—

“A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court.”

The effect of these concluding words is that it is no longer necessary to make a submission a rule or order of Court.

I. Meaning of the section.

Illustration.

“What is the meaning of the 36th section of the Lands Clauses Act? . . . It is not contended before me that the words ‘any such arbitration’ are confined to the arbitrations mentioned in the prior section; nor could it be, for there are terms in the subsequent part of the statute showing that those clauses apply to arbitrations under the subsequent sections, including the 68th section, which is the one in question. The 37th section goes on in this way [*vide* sect. 37]. Therefore there are two things contemplated: one is that you may make this submission a rule of Court; and the second is that there is some power of setting it aside, which is restricted by the terms of the 37th section. . . . Then when we find a second statute which simply provides that something which could not have been made a rule of Court under the prior statute, may be made a rule of Court, and which evidently contemplates the power of the Court to set aside the award made under that submission, does it not follow from the nature of the case that the jurisdiction intended to be conferred on the Courts by the words of the 36th section was the same as was conferred upon the Courts by the terms of the 1st section of the statute of Will. III., when it was made a rule of Court simply by the agreement of the parties? I think it must so follow, for otherwise I have no means of ascertaining what was the nature and extent of such jurisdiction, and I so hold”: *per* Jessel, M.R., in *In re Harper and Great Eastern Ry.* (1875), L. R. 20 Eq. at pp. 43—45.

NOTE.—The Court will use its powers to restrain multiplicity of actions or oppressive or vexatious litigation.

Illustration to Note.

A claim to compensation having been determined by arbitration, S., the claimant, considered that the award did not include his claim to a carriage-way and instituted a suit to enforce his rights, and also brought his action to recover the sum awarded. Wickens, V.-C.,

granted an injunction restraining the action until the hearing of the cause, and directed the compensation money to be paid into court : *Metropolitan Board of Works v. Salisbury (Marquis)* (1872), 26 L. T. 390.

II. Enforcement of the award.

(a) By action.

As the function of the arbitrator is merely to assess the *quantum* of compensation, and not to deal with the legal right of the claimant to have such amount paid to him by the promoters, it seems that the proper method of enforcing the award is by action, at all events where the question of liability is in dispute. This was the procedure followed in *Thompson v. Tottenham and Forest Gate Ry.* (1892), 67 L. T. 416 ; and in *Lowther v. Caledonian Ry.*, [1891] 3 Ch. 443 ; [1892] 1 Ch. 73 : in neither of these cases, however, was the question of the mode of procedure raised or discussed.

(b) Under the provisions of the Arbitration Act, 1889.

If, however, there is no dispute as to liability, or if the arbitration has not proceeded wholly under the Lands Clauses Act and the arbitrator has been empowered to deal with all questions, including that of liability, it would seem that the procedure for enforcing awards prescribed by sect. 12 of the Arbitration Act, 1889, is available. That section is as follows :—

“12. An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect,” *i.e.*, by summons in chambers.

(c) By the promoters depositing the amount awarded and executing a deed poll vesting the lands in question in themselves (*see* sects. 76 and 77, *post*).

(d) By action for specific performance (*see* sect. 6, *ante*).

III. Defences to action on award.

(a) It is a good defence that the claimant has suffered no damage.

Illustration.

To an action upon the award of an arbitrator, who had awarded B., the claimant, the sum of 80*l.* by reason of his premises being injuriously affected by the execution of the defendant company's works, *i.e.*, by the erection of an embankment and by the narrowing of the road in front of B.'s property, it was pleaded that B.'s property was not, nor was his interest therein, injuriously affected by the narrowing of the road, and that the sum awarded comprised money of uncertain amount awarded for damage sustained by B, by reason of his being, as the arbitrator wrongly supposed, injuriously affected by the

narrowing of the road. It was further pleaded that the award was bad :—*Held*, a good plea : *Beckett v. Midland Ry.* (1866), L. R. 1 C. P. 241.

(b) It is a good defence to an action on the award that a conveyance has not been executed (as to title, see *ante*, p. 59).

Illustrations.

(1) In an action by a vendor against a purchaser of land, the declaration stated that, in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same. Averment—that although the plaintiff had allowed the defendants to take possession, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing, yet the defendants disregarded their promise, and did not pay the plaintiff the purchase-money or any part thereof. Plea—that no conveyance had ever been made or executed to the defendants :—*Held*, on general demurrer, that the plea was bad, and the declaration good, the plaintiff having been discharged by the defendants : *Laird v. Pim* (1841), 7 M. & W. 474.

(2) The rule laid down in *Laird v. Pim* (*supra*) applies to a purchase made under statutory powers ; hence, where, after notice to treat, the amount of compensation to be paid for land compulsorily taken was fixed by an award under the Lands Clauses Act, it was *held* that an action to recover the amount would not lie until a conveyance of the land had been executed : *East London Union v. Metropolitan Ry.* (1869), L. R. 4 Ex. 309.

IV. Compensation money does not constitute a “debt due and accruing” within the meaning of Ord. XLV. rule 3, and cannot therefore be attached by a garnishee order.

Illustration.

A railway company took a leasehold house belonging to H., and the compensation to which he was entitled was assessed by a jury. Two garnishee orders *nisi* having been obtained and served upon the company :—*Held*, that the money could not be attached by this method, the 49th and 50th sections of the Lands Clauses Act not having the effect of creating an absolute debt due from the company to H. ; they are merely part of the machinery provided by the Act for ascertaining the purchase-money : *Howell v. Metropolitan District Ry.* (1881), 19 Ch. D. 508.

V. Where a company has refused to take up an award the claimant is not entitled to petition for the winding up of the company when his title has not been investigated and accepted.

Illustration.

A dock company served notice to treat upon L. and M., and afterwards took possession. The amount of purchase-money and compensation was afterwards determined by arbitration. The company failed to take up the award, and were therefore pressed to do so by the petitioners, who also forwarded to them an abstract of their title. The company took no step in the matter, and a petition to wind up the company was accordingly presented :—*Held* that, the title of the petitioners not having been investigated or accepted, they were not unpaid creditors, and that the petition must be dismissed : *In re Milford Docks* (1883), 23 Ch. D. 292.

"Award not void
through Error
in Form."

37. No Award made with respect to any Question referred to Arbitration under the Provisions of this or the Special Act shall be set aside for Irregularity or Error in Matter of Form.

See cases under sect. 35, ante.

An arbitrator or umpire has also power under sect. 7 (c) of the Arbitration Act, 1889, to "correct in an award any clerical mistake or error arising from any accidental slip or omission."

Promoters of the
Undertaking to
give Notice before
summoning a Jury.

38. Before the Promoters of the Undertaking shall issue their Warrant for summoning a Jury for settling any Case of disputed Compensation they shall give not less than Ten Days Notice to the other Party of their Intention to cause such Jury to be summoned, and in such Notice the Promoters of the Undertaking shall state what Sum of Money they are willing to give for the Interest in such Lands sought to be purchased by them from such Party, and for the Damage to be sustained by him by the Execution of the Works.

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Preliminary.—Sects. 38 to 57 deal with the determination of the amount of compensation by the verdict of a jury. The right to trial by jury is recognised in the Lands Clauses Act as the fundamental

principle of this part of the subject. The only exception occurs where the amount of compensation claimed (fixed in this case at 50*l.*) is too small to justify the cost of an inquiry before a jury.

I. Application of the section.

(a) Sect. 38 does not apply to proceedings under sect. 68.

Illustrations.

(1) R., having claimed compensation to an amount exceeding 50*l.* in respect of land required and also of land injuriously affected by the execution of works, gave notice of his desire to have such compensation assessed by a jury. It was alleged that twenty-one days elapsed after the receipt of the notice by the defendants without notice having been given to R. of intention to summon a jury, nor did the defendants, within such period, issue their warrant to the sheriff to summon a jury. The defendants pleaded that they did, within the twenty-one days, issue their warrant to the sheriff. R. contended that the warrant so issued was void for want of the notice required under sect. 38 :—*Held*, that the provisions of sect. 38 do not apply to proceedings under sect. 68, and that the plea was good : *Railstone v. York, Newcastle and Berwick Ry.* (1850), 15 Q. B. 404.

(2) R. claimed compensation by reason of his property having been injuriously affected by the execution of certain railway works, the effect of which was to destroy or obstruct the approaches to his property. R. claimed 1,000*l.*; the defendants offered him 60*l.*; the sheriff's jury awarded him 215*l.* R.'s costs were taxed at 243*l.*, and of these he claimed payment, as well as of the 215*l.* The defendants demurred as to the costs :—*Held*, that the words "in manner herein provided" in sect. 68 of the Lands Clauses Act incorporate all the previous provisions, and that the language of sects. 38 and 39 applies to *any* case of disputed compensation; and that therefore R. was entitled to his costs : *Richardson v. South-Eastern Ry.* (1851), 11 C. B. 154.

NOTE.—This case went to the Exchequer Chamber (15 C. B. 810), where the decision was affirmed that R. was entitled to his costs on the ground that sect. 51 (*post*), which provides for such costs, is virtually incorporated in sect. 68. As to the decision in *Railstone v. York, &c., Ry.* (*supra*), Parke, B., in delivering the judgment of the Court of Exchequer Chamber, said, at p. 821: "We do not consider it necessary to say whether or not we concur in the doubt suggested by the Court below as to the propriety of the decision of the majority of the Court of Queen's Bench in the case of *Railstone v. York, Newcastle and Berwick Ry.* (*supra*); for we think that case may be very good law, and yet the decision in the present case also may be right."

(3) "The provision for making an offer of the sum which the company are willing to give is wholly inapplicable to the case of compensation for lands injuriously affected by the execution of the works. The company are not supposed to know that the land is or will be injuriously affected, or what may be claimed, and therefore they cannot make an offer. Under sect. 68, where they have received notice of a claim for compensation in respect of lands which shall have been taken for or injuriously affected by the execution of the works, and the owner of the lands, claiming more than 50*l.*, desires to have the question of compensation settled by a jury, *he* must give notice thereof to the company, and, unless they are willing to pay the amount claimed, they must, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury, or they become liable for the amount claimed" : *per* Erle, C.J., in *Metropolitan Ry. v. Turnham* (1863), 14 C. B. N. S. at p. 225. "As to the time within which the company are bound to give notice, if it were necessary to decide that, and if that were the sole ground of decision in the case,

I should be prepared to follow the rule laid down by the Court of Queen's Bench in *Railstone v. York, &c. Ry.* (*supra*), viz., that the 38th section is confined in its operation to proceedings taken by the company to acquire lands: in giving their notice under that section, they must accompany it by an offer of the sum they are willing to give for the interest in the land, and the damage to be sustained by the owner by the execution of the works. As to the proceeding where without knowing of it the promoters have done injury to persons whose land they have not taken, the owner is the person to set the law in motion": *per* Willes, J., at pp. 227—228, *ib.*

(4) "In that case [*Railstone v. York, &c. Ry.*, *supra*] the company had given no notice of their intention to issue their warrant for summoning a jury, and therefore the warrant was not issued in 'the manner herein provided' if sect. 38 was incorporated in sect. 68. The majority of this Court held that the 38th section did not apply, and therefore the company were not bound to give notice of their intention to issue their warrant. It is true that the Court of Common Pleas, in *Richardson v. South-Eastern Ry.* (*supra*), thought that case did not consist with their decision; but the Court of Exchequer Chamber expressly stated that all that they decided in affirming the judgment of the Common Pleas was, that the 51st section was incorporated in the 68th, and that it did not follow that their decision and the decision of the Court of Queen's Bench in *Railstone v. York, &c. Ry.* might not stand together. That case certainly was not there overruled; and according to the general rule, the two decisions are binding upon us, and it must be taken that the 51st section is incorporated in the 68th, but the 38th is not": *per* Blackburn, J., in *In re Hayward and Metropolitan Ry.* (1864), 4 B. & S. at pp. 799—800.

(5) "Had the matter been *res integra* I should have thought the simpler and fairer construction would have been that the terms of sect. 68 with respect to issuing a warrant for summoning a jury to assess disputed compensation for lands injuriously affected referred to the warrant to be issued under sect. 38, and that the words 'in the manner herein provided,' which are found in sect. 68, covered the mode of issuing warrants prescribed by sect. 38. But the Courts, for reasons which have seemed good to them, have decided that, although by the terms of sect. 68 the warrant is to be issued 'in manner herein provided,' the provisions of sect. 38 must be rejected as inapplicable to proceedings under sect. 68": *per* Lord Coleridge, C.J., in *R. v. Manley Smith*, *In re Westfield and Metropolitan Rys.* (1883); 12 Q. B. D. at pp. 487—488.

(b) The proceedings under sect. 38 have been modified, in the case of railways, by the Regulation of Railways Act, 1868, s. 41 by which either party may, at any time before the promoters have issued their warrant for a jury, apply to a judge of the High Court for an order directing the inquiry to be held before a judge and jury in the High Court. The judge has a discretion to make such an order "upon such terms and in such manner as to him shall seem fit." The following cases have been decided on sect. 41:—

Illustrations.

(1) A verdict obtained under sect. 39 of the Lands Clauses Act having been set aside, the plaintiff on March 17th, 1881, gave renewed notice of his claim under sect. 68 (*post*). On April 4th the company took out a summons, returnable on the 8th, for an order, under sect. 41 of the Regulation of Railways Act, 1868. The defendant company had issued their warrant to the sheriff before the original trial, as required by sect. 68, but no fresh warrant was issued after the second notice, and the twenty-one days limited in sect. 41 of the Regulation of Railways Act elapsed after the date on which the summons was taken

out, but before it was returnable:—*Held*, that there was no jurisdiction to make the order: *Tanner v. Swindon Ry.* (1881), 45 L. T. 209.

(2) D. required the M. Railway Co. to issue their warrant for a jury to assess compensation claimed by him. The company applied to a master for an order under sect. 41 of the Regulation of Railways Act, 1868. The master refused the order, but on appeal to the judge it was granted. The time limited for issuing the warrant ran out between the day of hearing before the master and that of the appeal. The company issued their warrant after the hearing before the master:—*Held*, that by the operation of sect. 16 of the Judicature Act, 1873, the master had power to make the order; *held also*, that as the order made by the judge was the order which the master should have made, it must be taken to have been made at the time of the hearing before the master, that it was therefore made before any warrant was issued, and that the warrant was wrongly issued and was of no effect: *In re Donisthorpe*, [1897] 1 Q. B. 671.

(i.) New trial.

Illustration.

The Court has no power to grant a new trial of an issue directed under sect. 41 of the Regulation of Railways Act, 1868, to determine the right to compensation for lands taken for the purposes of a railway: *Birmingham Land Co. v. London and North-Western Ry.* (1889), 22 Q. B. D. 435.

(ii.) Time for appealing (compare Illustration under (i.), above).

Illustration.

A railway company, acting under statutory powers, took land under part of which the plaintiff company had laid a line of pipes for water. The railway company caused an embankment to be raised, under which the pipes were buried, and they fell into disuse. Afterwards, in carrying out other works, the railway company took up the pipes. The plaintiffs claimed compensation; and, in an issue stated according to the provisions of the Regulation of Railways Act, 1868, s. 41, to try a question of compensation, the time for appealing was *held* not to be limited to twenty-one days by Ord. LVIII. rule 15: *New River v. Midland Ry.* (1877), 36 L. T. 539.

II. Nature, contents, and effect of notice.

(a) The notice must contain an offer of a sum as compensation to the person served therewith.

Illustration.

“In this section [38], following exactly the scheme pointed out in sect. 23, the party taking the initiative, the company, are required, when they give their notice, to state what sum they are willing to pay to the claimant, so that the claimant shall have an opportunity of considering and determining whether he will accept their offer or not. If he does accept it, then further litigation is dispensed with”: *per* Blackburn, J., in *In re Fitzhardinge and Gloucester and Berkeley Canal* (1872), L. R. 7 Q. B. at p. 782.

(b) The offer must be unconditional and in respect only of the lands, &c., to be taken, and other lands injuriously affected.

Illustrations.

(1) B. having (under sect. 68) claimed 400*l.* as compensation for injury done to his property, an offer was made to him of 100*l.* in full satisfaction and discharge of the compensation claimed and of all costs, charges, and expenses. The sum of 75*l.* as compensation was afterwards assessed by a jury:—*Held*, that the offer was bad, as it ought to have been a plain and unconditional offer of a definite sum by way of *compensation* for the land: *Bulls v. Metropolitan Board of Works* (1866), L. R. 1 Q. B. 337. “If the offer of compensation is of one sum for compensation and costs, the claimant cannot know how much he is to have for the injury to his land and how much for his costs. He might, therefore, be misled by it. The offer required by the statute must be a plain and unconditional offer of compensation for injury to the land”: *per* Blackburn, J., at p. 341, *ib.*

(2) Land belonging to M. being required by a railway company, an arbitration took place to determine the amount of compensation due to the owner. The company had, before the arbitration, made an offer of 11,000*l.* Part of M.’s claim was for damage that would be caused to the residue of his land, which was building land, by cutting it off from the natural outfall for its drainage. At the arbitration it was agreed, by a memorandum which was recited in the award, that a right should be reserved to M. of making a sewer, for the drainage of the land, under the company’s land and railway; therefore no claim in respect of this item of damage was ultimately submitted to the arbitrator:—*Held* that, although the sum awarded was less than the amount of the company’s offer, the company was liable, under sect. 34 of the Lands Clauses Act, to pay M. his costs of the arbitration, as the award was not in respect of the subject-matter in respect of which the offer had been made: *Miles v. Great Western Ry.*, [1896] 2 Q. B. 432.

(c) An offer made at the time of giving notice of intention to summon a jury, and not afterwards withdrawn, holds good if the parties afterwards agree to arbitrate.

Illustration.

On June 29th, 1897, the defendants, acting under statutory powers, served the plaintiffs, under sect. 38 of the Lands Clauses Act, with notice of intention to summon a jury to assess the value of the plaintiffs’ land taken by them. The notice contained an offer to pay the plaintiffs 1,151*l.* for their interest in the lands. On July 10th, 1897, the plaintiffs, under sect. 23 of the Act, gave the defendants notice stating their desire to have the claim submitted to arbitration. Arbitrators were appointed by each side, and by an award dated January 17th, 1898, the umpire appointed by the arbitrators awarded the plaintiffs 1,033*l.* for purchase-money and compensation. The question for decision was whether, although the amount awarded by the umpire was less than that offered by the defendants in their notice of June 29th, 1897, the plaintiffs were entitled under sect. 34 to recover the costs incidental to the acquisition of this land and the arbitration:—*Held*, that the offer was within sect. 34 and had never been withdrawn, although the result arrived at was by means of arbitration, and not by a jury, and that therefore the claimant was not entitled to costs from the promoters: *Lascelles v. Swansea School Board* (1899), 69 L. J. Q. B. 24.

(d) In compulsory arbitration it is not essential that any offer should be made, but if none is made the promoters must inevitably pay the costs.

Illustration.

M., being entitled under a waterworks Act to compensation for abstraction of water from a certain stream, and having claimed a sum exceeding 50*l.*, agreed with the defendant

company to refer the matter to H. as sole arbitrator, under the provisions of the Lands Clauses Act. H. awarded 440*l.*, and afterwards, by writing, at the request of M., settled the costs at 107*l.* :—*Held*, that the costs were recoverable under sect. 34 by action, although M. had not claimed any specific sum from the company, and consequently no offer had been made by the company : *Martin v. Leicester Waterworks* (1858), 27 L. J. Ex. 432. “On minutely examining the statute, I am satisfied that Mr. Wilde was right on the point that all the costs of the arbitration and incident thereto are to be borne by the promoters of the undertaking unless the arbitrator shall not award a larger sum than is offered by the promoters of the undertaking. It had occurred to me that the statute contemplated that there must be a sum offered, but, on looking at the previous part of the Act, that is not so. Mr. Wilde is therefore right. If the company do not offer a sum, and there is a compulsory arbitration under the statute, the plaintiff inevitably ought to have the costs. If they do offer a sufficient sum, then they only have to pay the sum awarded. Here there was no compulsory arbitration under the statute. But still, I think, clause 34 was incorporated in the agreement of the parties. Consequently the plaintiff is entitled to the costs” : *per* Bramwell, B., at p. 437, *ib.*

(e) If before arbitration proceedings commence the offer is withdrawn, the promoters cannot afterwards claim the benefit of it.

Illustration.

A municipal corporation, being desirous of taking certain land for public purposes, appointed a committee to negotiate for it. The town clerk, acting upon instructions from some members of the committee, made an offer to the plaintiffs for a piece of land, which offer was refused. Each party appointed arbitrators, and upon the day that the umpire accepted his appointment the town clerk gave notice to the plaintiffs withdrawing the offer. To this withdrawal the plaintiffs assented in writing. The umpire awarded a less sum than that which had been offered. Afterwards the corporation passed a resolution ratifying the offer :—*Held*, that the corporation must pay the costs of the arbitration, and were not entitled to the benefit of sect. 34 : *Foster v. Sheffield Corporation* (1895), 72 L. T. 549.

III. Time for making offer.

(a) The offer under sect. 38 must be made by the promoters in their notice of intention to summon a jury.

Illustrations.

(1) T. claimed compensation under sect. 68 (*post*) by reason of the house and land, of which he was lessee, being injuriously affected by the execution of the defendant company's works. Thereupon the company issued their warrant to the sheriff to summon a jury, and, a week before the hearing, served upon T. a notice containing an offer of 25*l.* by way of compensation. At the inquiry the jury assessed the damages at 20*l.* In these circumstances, T. claimed his costs, by virtue of sect. 51 (*post*). The company, on the other hand, contended that they were entitled to one-half the costs of summoning, impannelling, and returning the jury and of the inquiry :—*Held*, that the offer was made too late, “the sum previously offered” in sect. 51 meaning the sum offered before the notice of the time and place of inquiry under sect. 46, which requires ten days' notice : *Metropolitan Ry. v. Turnham* (1863), 14 C. B. N. S. 212.

NOTE.—As to the taxation of costs, see the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11), s. 1 (2).

(2) On July 28th, 1868, a railway company gave P. notice to treat. On February 27th, 1869, P. sent in a claim for 9,702*l.*, and stated that she wished to have the compensation due to her assessed by a jury. In May, 1870, nothing having been done in the meantime, P. obtained a writ of *mandamus* to compel the company to summon a jury. Afterwards, in the same month, the company offered P. 4,000*l.*; and on May 31st a jury found a verdict for that sum. The company made no offer before they issued their warrant :—*Held*, that the words in sect. 51, “sum previously offered,” must mean the offer to be made under sect. 38, but that, in the present case, the company had not acted under sect. 38, and therefore P. was entitled to her costs : *Pearson v. Great Northern Ry.* (1869), L. R. 7 Q. B. 785, n.

(3) On March 9th the promoters gave W. the notice required by sect. 38, and stated that they were willing to give him 600*l.* as purchase-money and compensation. On March 19th the promoters gave W. a further notice, offering 900*l.* as purchase-money and compensation. This notice did not refer to, nor withdraw, the first. W. did not accept either, and on March 29th the promoters issued their warrant for a jury, who assessed the sum to which W. was entitled at 750*l.* :—*Held* that, in cases to which sect. 38 applied, the words “sum previously offered” in sect. 51 applied only to an offer in the notice of intention to summon a jury required by sect. 38; secondly, that the promoters were not entitled to treat the later offer of 900*l.* as an offer made under sect. 38, and that therefore they must pay the costs : *R. v. Manley Smith* (1883), 12 Q. B. D. 481.

(4) On April 29th, 1890, a School Board served notice to treat upon C. On May 12th C. sent in his claim. On June 5th the Board sealed a bond and paid the usual deposit into court under sect. 85 of the Lands Clauses Act, but did not actually take possession, there being a tenant in possession. On July 13th C. gave notice requiring the Board to issue their warrant for a jury within ten days, and claimed 5,000*l.* On July 21st the Board made an offer of 3,000*l.*, which was refused. On July 22nd C. served notice of a writ for a *mandamus* compelling the Board to proceed. On August 1st the Board issued their warrant for a jury, and gave C. notice under sect. 46 (*post*) of the inquiry :—*Held*, that the lands had not been “taken” within the provisions of sect. 85; and that as the promoters, notwithstanding that they had given a bond and paid a deposit, had not actually taken possession, the proceedings were governed by sect. 38 and not by sect. 68, and therefore the offer made was bad : *R. v. Manley Smith, In re Church and London School Board* (1892), 67 L. T. 197.

(b) In arbitration proceedings.

- (i.) The offer, if made before the claimant has delivered his appointment to the arbitrator (under sect. 25), is in time.

Illustration.

A notice to treat was given on December 16th, 1858; on January 7th, 1859, being twenty-one days later, the claimant nominated his arbitrator in writing; on January 17th he gave notice to this effect to the promoters and required them to appoint theirs. On January 25th the promoters offered 30*l.*, and next day the claimant declined this offer, but said he would accept 45*l.* for damage and costs. On February 3rd the promoters appointed their arbitrator, who selected an umpire, by whom, on April 25th, the sum of 23*l.* was awarded to the claimant. The costs were settled by the umpire at 35*l.* :—*Held*, that the tender of 30*l.* was in time, inasmuch as the claimant did not pursue the proper steps under sect. 25, and had not, when the offer was made, delivered his appointment to the arbitrator, down to which time everything done was revocable by the claimant, and that therefore he was not entitled to costs : *Yates v. Blackburn Corporation* (1860), 6 H. & N. 61.

- (ii.) The offer, if made after arbitrators (under sect. 23) have selected an umpire and extended the time for making the award, is too late.

Illustration.

Arbitrators appointed under sect. 23 of the Lands Clauses Act selected an umpire, and on two occasions extended the time for making the award. The company, after this date, made an offer which was not accepted, and the arbitration proceeded, the time for award having in the meantime been further enlarged. The umpire awarded a sum smaller than that offered :—*Held*, that the offer was made too late, as it was made after the appointment of the arbitrators, and that the claimant was entitled to costs under sect. 34 : *In re Gray and North-Eastern Ry.* (1876), 1 Q. B. D. 696.

IV. Second offer.

If an inquiry goes on, the offer made before the warrant was issued is final and conclusive, but if after such offer the claimant requires the compensation to be determined by arbitration instead of proceeding by writ of inquiry, the promoters may increase their offer up to the time the arbitration fairly commences, and similarly (*see* Illustration 1) where the claim arises under sect. 68 the promoters may increase their offer up to the time when notice is given by them under sect. 46 of the time and place of holding the inquiry.

Illustrations.

(1) On June 10th H. gave notice to a company claiming compensation for structural damage and also for loss of business arising from the prosecution of the company's works. On June 30th the company offered 70*l.* for structural damage and 30*l.* for loss of business. On the same day, this offer being refused, they issued their warrant to summon a jury. On July 2nd they made H. a fresh offer—100*l.* for structural damage and 50*l.* for loss of business. This also was declined, and at the inquiry the jury gave 50*l.* for structural damage and 100*l.* for loss of business :—*Held*—(1) that the company were not bound by their first offer, but might make a fresh one of larger amount ; (2) that, the jury having given the same sum as the amount of the amended offer, the claimant was not entitled to costs (under the similar provision in sect. 51 of the Lands Clauses Act) : *In re Hayward and Metropolitan Ry.* (1864), 4 B. & S. 787.

(2) Where the order of events was as follows : (1) Notice to treat ; (2) Particulars and claim of 28,000*l.* ; (3) Notice of intention to issue warrant for a jury, together with an offer of 15,237*l.* ; (4) Notice by claimant requiring arbitration ; (5) Appointment of the company's arbitrator ; (6) Notice thereof given by company to landowner, *together with a fresh offer of 17,000*l.** ; (7) Nomination by claimant of an arbitrator and notice thereof to the company ; (8) Award by umpire of 16,400*l.* :—*Held*, that the second offer, of 17,000*l.*, was a good one, as an offer made before the claimant incurs any costs of the arbitration or incident thereto which the company might be liable to pay, was in time : *In re Fitzhardinge (Lord) and Gloucester and Berkeley Canal* (1872), L. R. 7 Q. B. 776.
 “ When the present offer of 17,000*l.* was made, it appears to me that the claimant could in no way have incurred any costs. If the inquiry went on, the offer which had been made before the warrant issued would be the final and conclusive offer, and it would be too late to make another offer afterwards. That was in fact the decision in *Pearson v. Great Northern Ry.* (*ante*, p. 249), to which I was a party ; but I do not think that it at all follows that an offer once made with a view to an inquiry before a jury is to be considered final and conclusive ; and that when the claimant requires compensation to be assessed by arbitration, instead of proceeding by a writ of inquiry, the company may not increase their offer up to the time when the arbitration fairly commences. The claimant

might accept the increased offer if he thought it a reasonable sum; and he goes on, I think, at the peril of losing his costs": *per* Blackburn, J., at p. 782, *ib*.

(3) The joint committee of two railway companies gave notice to W., under sect. 38 of the Lands Clauses Act, reciting the notice to treat already given to him and that no agreement had been come to for the purchase of the land required, and further offering the sum of 600*l*. as purchase-money and compensation. At a later date this sum was, by another notice, increased to 900*l*. A warrant having been issued for the summoning of a jury, the sum of 750*l*. was assessed as purchase-money and compensation. Upon taxation, the master was of opinion that, this sum being less than the 900*l*. offered, W. was entitled only to costs under sect. 51 of the Lands Clauses Act; but *held*, that the promoters had no right (proceeding as they did under sect. 38) to increase the offer, and that W. was entitled to full costs: *R. v. Manley Smith* (1883), 12 Q. B. D. 481. "Apart from the decisions, I should think that the true, obvious and reasonable construction was that 'the sum previously offered' in sect. 51 meant the sum required to be offered by sect. 38. The promoters are taking a person's property adversely to his own benefit, and it does not seem an unreasonable thing that, before they are allowed to take from him that which he does not desire to part with, they should make him an offer by which they are bound to abide, and upon which he can take the advice of his surveyor, and come to a conclusion whether or not he will accept it or embark upon costly litigation with the promoters. I am disposed to think that if the notice of intention to cause a jury to be summoned coupled with the offer of the sum the promoters were willing to give were formally withdrawn and another notice were given not less than ten days before the summoning of the jury, and another offer of a larger sum substituted in that notice, it would be a good offer under sect. 38, and one upon which the promoters could rely with respect to the question of costs": *per* Coleridge, C.J., at p. 487, *ib*.

V. The offer by the promoters under sect. 38 may be accepted by the landowner at any time before the verdict of the jury.

Illustration.

The L. County Council, acting under statutory powers, served notice to treat in respect of certain premises and alleged them to be in an unhealthy state. The owners duly made a claim, and the Council gave notice of intention to summon a jury, and in the notice offered a certain sum of money as compensation. The offer was not accepted, and the Council then served notice on the high bailiff of W. requiring him to summon a special jury to find whether the premises were insanitary and the *quantum* of compensation due. At the hearing the jury found that the premises were insanitary, whereupon counsel for the claimants intimated that they would accept the offer made by the Council. Objection was made to this on the ground that it came too late, but the deputy high bailiff held the contrary view, and withdrew the case from the jury. No judgment was recorded. Upon application for a *mandamus* to compel the summoning of a fresh jury:—*Held*, that the offer had not been accepted too late, and that the jury should, in the circumstances, have been directed to find a verdict for the amount accepted: *R. v. Westminster (High Bailiff)*, [1903] 2 K. B. 189.

VI. Non-disclosure of offer.

The amount offered by the promoters should not be inquired into by the arbitrators or jury when assessing the amount of compensation.

Illustration.

"The arbitrators or umpire have no power *in the first instance* to inquire what was the amount of the previous tender, or anything beyond the compensation to be made: each

question is to be determined separately, the intention of the Legislature being that, so soon as it becomes necessary that the costs of the arbitration should be determined by the arbitrators, they shall have the power to tax and settle them by a separate instrument": *per* Parke, B., *Gould v. Staffordshire Potteries Waterworks* (1850) 6 Rail. Cas. at p. 575.

39. In every Case in which any such Question of disputed Compensation shall be required to be determined by the Verdict of a Jury the Promoters of the Undertaking shall issue their Warrant to the Sheriff, requiring him to summon a Jury for that Purpose, and such Warrant shall be under the Common Seal of the Promoters of the Undertaking if they be a Corporation, or if they be not a Corporation under the Hands and Seals of such Promoters or any two of them; and if such Sheriff be interested in the Matter in dispute such Application shall be made to some Coroner of the County in which the Lands in question, or some part thereof, shall be situate, and if all the Coroners of such County be so interested, such Application may be made to some person having filled the Office of Sheriff or Coroner in such County, and who shall be then living there, and who shall not be interested in the Matter in dispute; and with respect to the Persons last mentioned Preference shall be given to one who shall have most recently served either of the said Offices; and every Ex-Sheriff, Coroner, or Ex-Coroner shall have Power, if he think fit, to appoint a Deputy or Assessor.

Warrant for summoning Jury to be addressed to the Sheriff.

NOTE.—As to lands within the city and liberty of Westminster, *see* sect. 3 of the Lands Clauses Consolidation Act, 1869, *post*.

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I. Enforcing the issue of a warrant for a jury.

(a) If the promoters or company by whom notice to treat has been served do not proceed within a reasonable time thereafter, they may be compelled, by action of *mandamus*, to issue their warrant for a jury. This subject is fully considered at p. 166, *ante*.

II. Separate assessments for separate claims.

(a) Persons having separate interests have the right to separate juries, assessments, and verdicts.

Illustration.

"I confess I can come to but one conclusion on that clause, and that is this, that the claim for compensation is, in point of fact, the declaration, so to speak, on which the whole proceedings turn, and that it is not in the power of the Mayor and Aldermen to tack on to any person who properly makes a claim any other persons as plaintiffs in the proceedings. It is quite obvious that in some cases it would be most unfair to do so. I do not say whether it would be unfair or not in this case; but it would be in a great variety of cases, and I think it is the right of the person who makes a separate claim, and properly makes a separate claim, to have a separate jury, a separate assessment of whatever is due to him, a separate verdict, and a separate payment": *per* Giffard, V.-C., in *Abrahams v. London Corporation* (1868), L. R. 6 Eq. at p. 634.

(b) A person having several distinct interests in one property or in several distinct properties taken is entitled to insist on, and is not entitled to object to, the several interests being assessed by one jury.

Illustrations.

(1) Compensation was claimed by S. as lessee of two houses and as assignee of the lease of another house, in respect of which notice to treat had been served upon him by the London Corporation (who were proceeding under an Act which incorporated the London City Improvement Act, 1847). It was *held* that S. was not entitled to object to having the compensation for his interest in the different properties assessed by one jury and at one trial: *Starr v. London Corporation* (1869), L. R. 7 Eq. 236. In this case Romilly, M.R., cited and adopted the judgment of Giffard, V.-C., in *Abrahams v. London Corporation*, L. R. 6 Eq. 625, and said, "When there is only one person, who has different claims and interests in one property, or in different properties, all of which are taken by the Corporation, then I am of opinion that they are entitled to assess them all together."

(2) The Commissioners of Sewers gave notice to the Ecclesiastical Commissioners that they required to purchase and take all their estate and interest in the land forming the site of Nos. 19, 21, 23 and 25, Ludgate Hill. No agreement was come to as to the price and compensation; and the Commissioners of Sewers afterwards issued their warrant to summon a jury for the purpose of assessing what was due in respect of No. 25 alone. The Ecclesiastical Commissioners thereupon brought an action for a declaration that proceedings could not legally be taken as to part only of the property in question, without, at the same time, ascertaining the compensation payable for the whole:—*Held*, that the Sewers Commissioners were bound to summon a jury, and one jury only, to assess the value of the whole of the property to which the notice to treat related: *Ecclesiastical Commissioners v. Commissioners of Sewers of City of London* (1880), 14 Ch. D. 305.

(c) Where several persons are interested in the same land the jury must apportion the compensation among the various parties interested.

Illustration.

The trustees of a turnpike road, under a local Act, claiming to take certain premises on paying compensation to the persons interested, served a notice on a party containing an offer of a sum of money as compensation for his undivided third part in the premises, with a warning that, in default of his acceptance, a jury would be summoned to assess the compensation. They afterwards served him with a second notice directed to him and other persons interested that a jury would be sworn, under statute, to assess the sums to be paid for the respective interests. The jury were summoned and sworn to assess the sums to be paid to the parties for their interests, but found only the gross value of the premises; and the inquisition stated that the jury found that sum to be the value to be paid for the various interests, "according to their respective proportions therein," without apportioning them:—*Held*, that the inquisition was bad for not apportioning the value among the parties interested: *R. v. Norwich and Watton Road Trustees* (1836), 5 A. & E. 563.

III. The warrant to the sheriff.

In the warrant issued to the sheriff to summon a jury the land described as that in respect of which the jury are to assess the value must be the same, that is, neither less nor more than that given in the notice to treat, but any discrepancy between the two descriptions will be treated as waived if the claimant appears and proceeds in the inquiry.

Illustrations.

(1) The defendants gave a notice to treat as to part of a yard belonging to S. In the precept delivered to the sheriff, however, a different part of the yard was described in detail. The defendants were restrained from dealing with, or having the value assessed of, any part of the property save that described in the notice to treat: *Stone v. Commercial Ry.* (1839), 4 Myl. & Cr. 122; 48 R. R. 32. "I find no authority to sub-divide the contract, as the company have done in this case, and that without any new notice to the party, who has no means of knowing what it is which is to be the subject of inquiry before the jury. If the company could do that, they would not be bound to complete their contract, and when the parties came before the jury the owner might be told that it was not the intention of the company to take the opinion of the jury upon the value of that which was comprised in the notice, but upon the value of a small part of it only; for if they are not bound by the notice, they may take the jury's opinion upon any part of the land, without any intimation to the owner as to what part that is to be": *per* Lord Cottenham, C., at p. 125, *ib.*

(2) In the notice to treat the parcels of land were described as Nos. 160 and 171 on the deposited map; in the precept to the sheriff they were described as 164, 166 and 181. At the trial this discrepancy was made a ground of objection, but as this was overruled the case proceeded in the usual way and the jury assessed the amount of compensation. On a motion for a *certiorari* to quash the inquisition on the ground of the discrepancy between the notice to treat and the precept to the sheriff:—*Held*, that by appearing before the jury and, after the objection had been overruled, by proceeding in the trial, the claimant had waived the objection: *Ex parte Bailey* (1852), Bail C. C. 66.

NOTE.—The following case, decided under a local Act, may be compared with the foregoing :—

Illustration to Note.

A local drainage Act created the lords of three manors, or, in their absence, their agents appointed in writing under their hands, commissioners for executing the Act ; it authorised the commissioners to take lands for the purposes of the drainage, and it contained clauses for that purpose to the same effect as those in the Lands Clauses Act, afterwards passed. It also provided that no person should be capable of acting as a commissioner or agent for a commissioner until he had made a declaration that he would duly execute the powers in the exercise of which he should act as commissioner or agent. The three lords of the manors, by writing under their hands, appointed the defendants their agents, but without having first made the declaration. The defendants acted as commissioners (first making the declaration), and gave the plaintiff written notice that they required to take, for the purposes of the Act, 3a. 1r. 25p. of his land, describing the land specifically. The plaintiff refused to treat, and the commissioners thereupon issued a warrant to the sheriff to summon a jury to assess the sum payable to the plaintiff for the purchase of 3a. 1r. 25p. of land, required for the purposes of the Act ; but the warrant did not recite or refer to the notice nor describe specifically which 3a. 1r. 25p. were required. The plaintiff had 200 acres of land in the district. Both notice and warrant were in the defendants' names as commissioners. A jury was impanelled, and assessed the price of 3a. 1r. 25p. pointed out to them, which were, in fact, the land described in the notice. An inquisition was drawn up, reciting the warrant but not the notice, and not showing specifically in respect of which 3a. 1r. 25p. of the plaintiff's land the price was assessed. The plaintiff, who had protested throughout against the proceedings, refused to receive the price so assessed. The defendants paid it into a bank, pursuant to the Act, and took possession. The plaintiff thereupon brought his action:—*Held*, that the lords of the manors were commissioners by virtue of the local Act, and, if they did not choose to officiate, might appoint agents for such time as they thought proper ; which agents thereupon became commissioners, and might issue notices and warrants in their own names and were not bound to show on the face of their proceedings for what land they respectively acted ; that such appointment was well executed although the lord had not first made the declaration required by the local Act ; and that the inquisition was good, although it did not, directly or by reference, specify the particular acres, roods, and perches for which the commissioners were to pay : *Ostler v. Cook* (1852), 18 Q. B. 831.

IV. Disqualification of sheriff.

(a) The sheriff is disqualified from acting under the section if his interest in the subject-matter of the inquiry is such as would disqualify a justice at common law ; he is not disqualified if his interest is only remote and contingent (and see *ante*, pp. 189, 190).

Illustration.

S. claimed compensation for land taken under a special Act by the M., S. and L. Railway Co. The company issued their warrant to the sheriff on July 17th, 1866. An Act became law on July 16th, 1866, which provided that under certain circumstances the M. Railway Co. were enabled to acquire an interest in the undertaking authorised by the M., S. and L. Company's Act. The sheriff was a shareholder in the M. Company :—*Held*, that the words "interested in the matter in dispute" in sect. 39 of the Lands Clauses Act means a direct and certain interest, not one remote or contingent, and that therefore the sheriff was not disqualified by interest : *R. v. Manchester, Sheffield and Lincolnshire Ry.* (1867), 36 L. J. Q. B. 171.

(b) If the sheriff has an interest the warrant should be delivered to the coroner unless there are two sheriffs, in which case it should be delivered to the sheriff who is not interested.

Illustrations.

(1) "Where there are two sheriffs, and one of them is interested, the process ought to go to the other": *per Curiam* in *Letsom v. Bickley* (1816), 5 M. & S. at p. 145.

(2) Rule calling upon the defendants to show cause why a *certiorari* should not issue to bring up an inquisition taken before the sheriff on the ground that the sheriff was interested in the transaction as a shareholder in the company:—*Held*, making the rule absolute, that the section ought to have been followed by delivering the warrant to the coroner: *R. v. London and North-Western Ry.* (1863), 9 L. T. 423.

(c) The warrant is properly issued to the sheriff although the under-sheriff may be interested as a shareholder in the promoting company, but in such a case the sheriff should either take the inquisition himself or appoint a disinterested deputy.

Illustration.

The plaintiff by his first count alleged that the defendants directed their warrant to the sheriff of D. to assess the plaintiff's compensation for lands proposed to be taken, knowing the under-sheriff to be interested in the defendant company; that the interested under-sheriff presided at the inquiry; and that it was in consequence quashed, by which the plaintiff sustained damage:—*Held* bad on general demurrer, inasmuch as the warrant was properly directed to the sheriff, and the improper conducting of the inquiry was not the act of the defendants: *Worsley v. South Devon Ry.* (1851), 16 Q. B. 539. "The alleged grievance is that the defendants, the company, issued their warrant to the sheriff though they knew that the under-sheriff was interested. If we look at sect. 39 alone, it is clear that this was no wrong; the promoters by that section shall issue their warrant to the sheriff, unless he is interested: it is to be presumed that the sheriff would execute the process in person or by a disinterested deputy; and, if he does not do so, that is not the fault of the promoters. But the objection is rested on the interpretation clause (sect. 3), by which 'unless there be something either in the subject or context repugnant to such construction,' the word 'sheriff' is to include 'under-sheriff or other legally competent deputy.' Now I think that there is something repugnant in adopting this statutable interpretation in the 39th section; for it cannot be substituted for 'sheriff' in the first part of the sentence by which the warrant is to be issued to the sheriff; that cannot be read as if the enactment were that 'the promoters shall issue their warrant to the sheriff, including the under-sheriff or other legally competent deputy.' And, even in the latter part of the section, it will not answer the plaintiff's purpose to substitute for the word 'sheriff,' 'sheriff, including under-sheriff or other legally competent deputy'; they must deviate from the words in the interpretation clause, and ask us for 'sheriff' to read 'sheriff or under-sheriff.' There is no reason to do so. It is decided . . . that when two parties, one of whom is interested, exercise the office of sheriff, the warrant shall not go to the coroner but to the disinterested sheriff: these cases . . . show that the warrant in the present case was properly directed to the sheriff": *per* Lord Campbell, C.J., at pp. 543-544, *ib.* "Our decision on the *certiorari* in this case was not on the ground that the warrant was directed to the sheriff, but because the interested under-sheriff interfered": *per* Patteson, J., at p. 544, *ib.*

(d) If the claimant, knowing the interest of the person in question,

does not object at the proper time he will be taken to have waived his right to object (see also *ante*, p. 194).

Illustrations.

(1) Where a sheriff, who had impannelled the jury and held the inquiry, had an interest in the promoters' undertaking, the Court said: "And, supposing them [*i.e.*, the acts of the sheriff] to have been voidable, if objected to at the proper time, we think the company have waived any objection, if such could have been made by them, by appearing before the sheriff and jury and allowing the inquisition to proceed, and the judgment to be given thereon": *Corrigal v. London and Blackwall Ry.* (1849), 5 Man. & G. at p. 247.

(2) Where before any step was taken the under-sheriff informed the claimant that he was a shareholder in the promoting company, and the claimant made no objection until the verdict had been given:—*Held*, that he had elected to waive the protection of sect. 39 of the Lands Clauses Act: *Ex parte Baddeley* (1849), 5 Rail. Cas. 542.

(3) The Corporation of B. gave notice to L., whose house had been pulled down, to set his new house further back, under an improvement Act incorporating part of the Towns Clauses Act. Compensation might be awarded for this. The corporation issued their warrant to the sheriff, and the under-sheriff heard the case. The sheriff was a ratepayer of B. and liable to the payment of the money. The Act provided that the under-sheriff should not be disqualified by reason of being a ratepayer. L. at the time of the inquiry did not know of the sheriff's disqualification:—*Held*, that the inquisition must be set aside, as the warrant should have gone to the coroner, unless L. had waived his right, which he had not done: *R. v. Warwickshire (Sheriff)* (1855), 3 W. R. 164.

V. If the finding of the jury is quashed the original warrant remains unimpeached and the sheriff is bound to proceed under it.

Illustration.

The plaintiff having given notice to the defendants, a railway company, under sect. 68, that his premises had been injuriously affected by the execution of their works, and that he demanded compensation and an assessment before a jury, the defendants issued a warrant, and a jury was summoned, who found that no compensation was due to the plaintiff. The plaintiff thereupon obtained a rule to quash the inquisition, verdict and judgment, and gave the company a fresh notice, and, the company not issuing another warrant, the plaintiff brought action:—*Held* that, the original warrant remaining unimpeached, the sheriff was bound to proceed under it, by summoning a fresh jury, and that the company were in no default: *Horrocks v. Metropolitan Ry.* (1865), 19 C. B. N. S. 139.

NOTE.—As to quashing verdict by *certiorari*, see sect. 145 (*post*), and rules and illustrations thereunder.

40. Throughout the Enactments contained in this Act relating to the Reference to a Jury, where the Term "Sheriff" is used, the Provisions applicable thereto shall be held to apply to every Coroner or other Person lawfully acting in his Place, and in every Case in which any such Warrant shall have been directed to any other Person than the Sheriff, such Sheriff

Provisions
applicable to
Sheriff to apply
to Coroner.

shall, immediately on receiving Notice of the Delivery of the Warrant, deliver over, on Application for that Purpose, to the Person to whom the same shall have been directed, or to any Person appointed by him to receive the same the Jurors Book and Special Jurors List belonging to the County where the Lands in question shall be situate.

41. Upon the receipt of such Warrant the Sheriff shall summon a Jury of Twenty-four indifferent Persons, duly qualified to act as Common Jurymen in the Superior Courts, to meet at a convenient Time and Place to be appointed by him for that Purpose, such Time not being less than Fourteen nor more than Twenty-one Days after the Receipt of such Warrant, and such Place not being more than Eight Miles distant from the Lands in question, unless by Consent of the Parties interested, and he shall forthwith give Notice to the Promoters of the Works of the Time and Place so appointed by him.

Jury to be
Summoned.

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I. The sheriff or other officer whose duty it is to execute the warrant has no power to postpone its execution.

Illustration.

The L. Corporation under an improvement Act gave notice to G. that they required premises of his and that a precept to the Recorder had issued to summon a jury. G. disputed their right to take the land, and proceedings in that behalf were pending. By consent the proceedings were postponed, and subsequently, on G.'s application, the Recorder granted a further postponement :—*Held*, on application by the Corporation, that *mandamus* should not issue as the day named in the precept had passed, but that the remedy was *certiorari* to quash the order for postponement; *held also*, that the Recorder had no power to make such an order, and that the order must be brought up to be quashed : *Galloway v. London Corporation*, 12 Jur. (N.S.) 182.

II. Where the inquiry proves to be abortive, the sheriff should summon a fresh jury under the authority of the warrant in his hands; a fresh warrant is not necessary.

Illustrations.

(1) The plaintiff gave notice to the defendant company that his property had been injuriously affected by the execution of works by them, and that he demanded compensation and desired the same to be assessed by a jury. The defendant company accordingly issued their warrant for a jury, by whom a verdict was found that no compensation was due to the plaintiff. The plaintiff thereupon obtained a rule quashing the inquisition, verdict and judgment thereon, and gave the defendant company a fresh notice; but the company declined to issue another warrant, and the plaintiff thereupon brought an action to recover the amount of compensation claimed by him. The company pleaded (*inter alia*) that they had issued their warrant to the sheriff, but that it remained unexecuted and of full force in his hands:—*Held* that, the original warrant remaining unimpeached, the sheriff was bound to go on under it by summoning a fresh jury, and that the company was not in default: *Horrocks v. Metropolitan Ry.* (1865), 19 C. B. N. S. 139.

(2) A claim for compensation having been tried before a jury, under sect. 39 of the Lands Clauses Act, the verdict was set aside by the Court on the ground of treating by the plaintiff, who then gave renewed notice of his claim under sect. 60 of the Lands Clauses Act, on March 17th, 1881, and on April 4th the defendants took out a summons, returnable on April 8th, under sect. 41 of the Regulation of Railways Act, 1868, for an order that the question of compensation should be tried in the High Court. The defendants had issued their warrant to the sheriff before the original trial, but no fresh warrant was issued by them after the second notice, and the twenty-one days limited by sect. 41 of the Regulation of Railways Act, 1868, for its issue had expired after the taking out of the summons, but before it was returnable:—*Held*, that the order could not be made: *Tanner v. Swindon Ry.* (1881), 45 L. T. 209.

III. The warrant, although it does not properly follow the original demand nor rightly state the purpose for which the jury should be summoned, must, if sufficiently correct, be acted on by the sheriff.

Illustration.

A railway company were required (in accordance with the provisions of their Act) to purchase a public-house, forty-four feet in depth, the greater part of which was within fifty feet of the railway, but a portion, comprising the bar, and varying in depth from thirteen to sixteen feet, was more than fifty feet from the railway; and it was alleged that the premises were deteriorated by the railway, and that if the former portion only were purchased the residue would be useless to the owner. The owner gave notice to the company to purchase the whole premises, stating them to be situate within fifty feet of the railway, and to make compensation for goodwill, &c. This not being done, he required them to summon a jury who should determine whether he was entitled to have the premises purchased and compensation made as before demanded, and should assess the sums payable. No answer being given, he sent a precept to the sheriff, stating the premises to be within fifty feet of the railway, and deteriorated by it, reciting the previous notices, and requiring the sheriff to summon a jury to inquire whether the property in respect of which his claims had been made was deteriorated by the railway, and whether he was entitled under the statutes to have the premises purchased and compensation made, as claimed, and, if so, to assess, &c. The sheriff at the inquiry, finding that part of the dwelling-house was more than fifty feet from the railway, refused to hear further evidence, and directed the jury to find that the claimant was not entitled to have his property purchased by the company, part of it not being within fifty feet, &c. Upon motion for a *mandamus* to the sheriff to execute the precept:—*Held*, that the requisition, although it did not properly follow the original demand, nor rightly state the purpose for which the jury should be summoned, was sufficiently correct to have been acted upon by the sheriff. *Mandamus* granted: *Walker v. London and Blackwall Ry.* (1842), 3 Q. B. 744.

Jury to be
impanelled.

42. Out of the Jurors appearing upon such Summons a Jury of Twelve Persons shall be drawn by the Sheriff, in such Manner as Juries for Trials of Issues joined in the Superior Courts are by Law required to be drawn, and if a sufficient Number of Jurymen do not appear in obedience to such Summons the Sheriff shall return other indifferent Men, duly qualified as aforesaid, of the Bystanders, or others that can speedily be procured, to make up the Jury to the Number aforesaid; and all Parties concerned may have their lawful Challenges against any of the Jurymen, but no such Party shall challenge the Array.

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I. Jurymen taken ill before hearing and replaced by another.

Illustration.

For the purpose of assessing compensation claimed by the plaintiff a jury was duly sworn, and the holding of the inquisition was then adjourned. On the adjournment day, one of the jurymen being absent from illness, the sheriff, with the assent of the parties, swore J. A., another of the jurymen who had been regularly summoned, in his stead, and the jury so constituted assessed the compensation. The defendants, who were sued for the amount of the compensation so found, pleaded (*inter alia*), that the jury was irregularly constituted, but the Court refused to allow this objection to be raised by the defendants, and required them to elect between that and certain other pleas pleaded by them : *Cooling v. Great Northern Ry.* (1850), 19 L. J. Q. B. 529.

II. If a jurymen is not qualified, the proper remedy is by challenge.

Illustration.

The Court refused to set aside the verdict found upon an inquisition to determine the compensation payable for land taken under the Lands Clauses Act on the ground that some of the jurors were not qualified to act as jurors, as the only remedy, in such a case, is by challenge : *In re Chelsea Waterworks, Ex parte Phillips* (1855), 10 Ex. 731.

III. An omission to strike the special jury in sufficient time to allow three days before the date of the inquiry for summoning them, whereby the inquisition is found by less than twelve, is an irregularity only, and does not vitiate the proceedings.

Illustration.

Compensation having been claimed under the Lands Clauses Act, and a special jury required, the sheriff appointed August 13th for the hearing. On that day only eight special jurors appeared, and, under protest, the inquisition was found by the eight. It appeared that the special jury had been reduced only on August 11th, so that there were not three days left for summoning the special jurors :—*Held*, that this omission was, at most, a mere irregularity, and did not vitiate the proceedings : *Ex parte Great Western Ry.* (1851), 18 L. T. (O.S.) 92.

Sheriff to
preside, Wit-
nesses to be
summoned.

43. The Sheriff shall preside on the said Inquiry, and the Party claiming Compensation shall be deemed the Plaintiff, and shall have all such Rights and Privileges as the Plaintiff is entitled to in the Trial of Actions at Law ; and if either Party so request in Writing, the Sheriff shall summon before him any Person considered necessary to be examined as a Witness touching the Matters in question, and on the like Request the Sheriff shall order the Jury, or any Six or more of them, to view the Place or Matter in controversy, in like Manner as Views may be had in the Trial of Actions in the Superior Courts.

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I. If the sheriff does not preside, an objection, to be effective, must be made at the trial.

Illustration.

At the hearing of a claim for compensation the deputy high bailiff presided instead of the high bailiff. No objection was made at the trial, although both parties knew that it was the deputy and not the high bailiff who was presiding. A *certiorari* to bring up and quash the inquisition on the ground that the high bailiff had no power to appoint a deputy, and, secondly, on the ground that the inquisition ought to have been taken by the sheriff, was refused, as the parties, knowing of the alleged defect of jurisdiction, had not objected at the time : *Emanuel Hospital v. Metropolitan District Ry.* (1869), 19 L. T. 692.

NOTE 1.—This case was decided before the passing of the Lands Clauses Act, 1869.

NOTE 2.—The two following cases as to the effect of a deputy presiding at certain inquiries not under the Lands Clauses Act may be noted :—

Illustrations to Note 2.

(1) In the absence of a coroner, an inquest was held by E. M., his deputy. During the hearing the principal arrived and remained, but did not sum up or sign the inquisition or

view the body. The inquisition was signed "R. D., by E. M., his deputy":—*Held*, that this was correct, and that the accidental presence of the principal made no difference: *R. v. Perkin* (1845), 7 Q. B. 165.

(2) An under-sheriff signed a certificate under 3 & 4 Vict. c. 24, s. 2 (now repealed), in this form: "I certify that the grievance within complained of was wilful and malicious." (Signed) "Jacob Pleydell Bouverie, commonly called Viscount Folkestone, Sheriff":—*Held*, that this proceeding was correct, and that, in fact, the under-sheriff would have done wrongly in signing his own name: *Stroud v. Watts* (1846), 3 D. & L. 799.

II. The words "the party claiming compensation . . . shall have all such rights and privileges as the plaintiff is entitled to in the trial of actions at law" do not entitle the successful party to the general costs of the inquiry.

Illustrations.

(1) A special railway Act made provision for the hearing of claims for compensation before a jury and for the regulation of the inquiry, and enacted that, at such inquiry, the party claiming compensation should be "deemed to be plaintiff and entitled to the same rights and privileges as plaintiffs in actions at law":—*Held*, that these provisions did not entitle the successful party to the general costs of the inquiry, such as might be recovered in an action by the party who gained the verdict: *Rex v. Gardner* (1837), 6 A. & E. 112. "The words in sect. 66, that the party claiming compensation shall be 'deemed to be plaintiff, and entitled to the same rights and privileges as plaintiffs in actions at law,' were clearly intended, not for the purpose which has been attributed to them, but to regulate the general course of proceedings, to remove doubts concerning the right to begin, and to show, in other respects, how the inquisition should be conducted": *per* Lord Denman, C.J., at p. 117, *ib.*

(2) On words similar to those in *Rex v. Gardner* (*supra*) it was *held* that they did not entitle the claimant to the costs of the attorney's letters and attendances, nor to the expenses of plans, &c., paid to the surveyors not called as witnesses: *R. v. Warwickshire (Sheriff)* (1841), 2 Rail. Cas. 661.

III. The sheriff or jury cannot be ordered to view in another county.

Illustrations.

(1) "I feel perfectly satisfied that I have no power to direct a view in such a case, nor could I compel the sheriff of Middlesex to go with a Middlesex jury and have a view in Glamorganshire; neither could the jury be required to go out of the county": *per* Coleridge, J., in *Malins v. Dunraven (Lord)* (1845), 9 Jur. 690.

(2) In an action the venue had been fixed in Manchester, but the defendant wished the place where the cause of action arose—in Cheshire—to be viewed by the jury:—*Held*, that the Court had no power to order the sheriff of Lancashire to bring a Lancashire jury to view lands in Cheshire: *Stoke v. Robinson* (1889), 6 T. L. R. 31.

See also R. S. C., Ord. L. rule 5.

Penalty on Sheriff
and Jury for
Default.

44. If the Sheriff make default in any of the Matters hereinbefore required to be done by him in relation to any such Trial or Inquiry, he shall forfeit Fifty Pounds for every such Offence, and such Penalty

shall be recoverable by the Promoters of the Undertaking by Action in any of the Superior Courts; and if any Person summoned and returned upon any Jury under this or the Special Act, whether common or special, do not appear, or if appearing, he refuse to make Oath, or in any other Manner unlawfully neglect his Duty, he shall, unless he show reasonable Excuse to the Satisfaction of the Sheriff, forfeit a sum not exceeding Ten Pounds, and every such Penalty payable by a Sheriff or Juryman shall be applied in satisfaction of the Costs of the Inquiry, so far as the same will extend; and, in addition to the Penalty hereby imposed, every such Juryman shall be subject to the same Regulations, Pains, and Penalties as if such Jury had been returned for the Trial of an Issue joined in any of the Superior Courts.

As to effect of default of sheriff.

Illustration.

“The sheriff is, in substance, made the judge in this matter; and, by sect. 44, if he ‘make default in any of the matters thereinbefore required to be done by him in relation to any such trial or inquiry, he shall forfeit 50*l.* for every such offence, and such penalty shall be recovered by the promoters of the undertaking by action in any of the superior courts.’ The neglect of the sheriff, however, does not interfere with the rights of the parties”: *per* Willes, J., in *Horrocks v. Metropolitan Ry.* (1865), 19 C. B. N. S. at p. 147.

Penalty on Wit-
nesses making
Default.

45. If any Person duly summoned to give Evidence upon any such Inquiry, and to whom a Tender of his reasonable Expenses shall have been made, fail to appear at the Time and Place specified in the Summons without sufficient Cause, or if any Person, whether summoned or not, who shall appear as a Witness refuse to be examined on Oath touching the Subject Matter in question, every Person so offending shall forfeit to the Party aggrieved a sum not exceeding Ten Pounds.

46. Not less than Ten Days Notice of the Time and Place of the Inquiry shall be given in Writing by the Promoters of the Undertaking to the other Party.

Notice of Inquiry.

The right to this notice may be waived explicitly or by implication.

Illustration.

L. was served with notice to treat by the G. Commissioners, and subsequently a special jury was nominated in the presence of L.'s land agent. The commissioners moved the sheriff to postpone the day of trial, but L. refused to consent; and the sheriff refused the motion. L. brought suspension on the grounds that the promoters had not given him ten days' notice in writing under sect. 40 of the Lands Clauses (Scotland) Act (equivalent to sect. 46 of the Lands Clauses Act):—*Held*, that L. had dispensed with his right of objection by his appearance before the sheriff and by his other actions: *Lang v. Glasgow Court House Commissioners* (1871), 9 Ct. Sess. Cas. (3rd series) 768.

47. If the Party Claiming Compensation shall not appear at the Time appointed for the Inquiry such Inquiry shall not be further proceeded in, but the Compensation to be paid shall be such as shall be ascertained by a Surveyor appointed by Two Justices in manner herein-after provided.

If the Party make default the Inquiry not to proceed.

What is an appearance.

Illustration.

Where a separate notice to treat was served in 378 cases, and a nominal tender of compensation was made, and notice of inquiry before the sheriff given, the solicitor for the claimant appeared in the first case called on, and then protested against the Court proceeding in the remaining 377 and withdrew from the inquiry. The promoters proceeded notwithstanding, had each case called on, and obtained a finding in each and paid the amount of compensation into court:—*Held*, that the appearance in one case was an appearance in all, and the claimant was thereby bound: *R. v. Donegal Estate Trustees* (1848), 12 Ir. L. R. 539.

48. Before the Jury proceed to inquire of and assess the Compensation or Damage in respect of which their Verdict is to be given they shall make Oath that they will truly and faithfully inquire of and assess such Compensation or Damage, and the Sheriff shall administer such Oaths, as well as the Oaths of all Persons called upon to give Evidence.

Sums to be paid for Purchase of Lands and for Damage, to be assessed separately.

49. Where such Inquiry shall relate to the Value of Lands to be purchased, and also to Compensation claimed for Injury done or to be done to the Lands held therewith, the Jury shall deliver their Verdict separately for the Sum of Money

to be paid for the Purchase of the Lands required for the Works, or of any Interest therein belonging to the Party with whom the Question of disputed Compensation shall have arisen, or which, under the Provisions herein contained, he is enabled to sell or convey, and for the Sum of Money to be paid by way of Compensation for the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such Lands by the Exercise of the Powers of this or the Special Act, or any Act incorporated therewith.

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I. Requirement of separate assessments.

(a) The requirements in this section as to separate assessments are directory only and not conditional, and therefore if at the inquisition the parties do not demand separate assessments by the jury, a fresh inquiry will not be ordered.

Illustrations.

(1) A railway company having, under a local and personal Act, given a notice to treat to K. and having failed to agree with him upon the amount of compensation, issued their warrant for a jury. The Act provided that the value of the property taken and the compensation should be assessed separately. The jury found a verdict for 15,000*l.*, one lump sum for the value of K.'s property, together with compensation. At the hearing neither party demanded a separate assessment :—*Held*, that a *mandamus* to the sheriff, at the instance of the company, directing a fresh inquiry, could not be granted : *In re London and Greenwich Ry.* (1835), 2 A. & E. 678.

(2) Where the words in the Act were “that the satisfaction, recompense, or compensation for such damage or loss to be inquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid,” it was *held* that these words were directory only, and that the promoters could not treat the verdict as a nullity ; it having been their duty to have called upon the jury at the time to make a separate assessment of the value and of the damages, which they had not done : *Corrigal v. London and Blackwall Ry.* (1843), 5 Man. & G. at p. 248.

(3) “In this case, several objections were made against the award of the umpire. First, that one sum was awarded for damage and price, instead of a separate sum on each

account. The answer is that, in respect of arbitration, there is no requirement in the statute for separate assessments, and that, in respect of verdicts upon inquisitions, such requirements as are in sect. 49 of the present statute are directory and not conditional: *In re London and Greenwich Ry.* (1835), 2 A. & E. 678; *Corrigal v. London and Blackwall Ry.* (1843), 5 Man. & G. 219: *per* Denman, C.J., in *In re Bradshaw, In re East and West India Docks* (1848), 12 Q. B. at p. 572.

(4) Where a jury were impannelled to ascertain the value of H.'s interest and separately the damage by loss of trade, &c., and counsel agreed to a verdict by the jury for 600*l.*:—*Held*, that “the 600*l.* did not represent the sum to be paid for such interest, if any, which the claimant should have; but it must be treated as the value which the jury, by agreement, assessed for the interest claimed, and also for damage by severance and loss of trade. The intention was that the value of that should be ascertained only as a claim, and not to determine what the rights were in that respect”: *per* Kindersley, V.-C., in *In re Hayne* (1865), 13 W. R. 492.

(b) The jury are entitled to assess damages for land taken and for damage by severance or injurious affection. “Where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act”: *per* Lord Watson in *Couper Essex v. Acton Local Board*, *post*, p. 324.

Illustration.

A volunteer corps had leases of lands for the purposes of a rifle range; they also had a lease of marsh lands behind but not adjoining the butts, and a verbal agreement with the owner of lands intervening between the two leaseholds for the use of his lands during rifle practice. The G. Company took a portion of the marsh land under their compulsory powers:—*Held* that, as the two leaseholds were occupied for a common purpose, though not contiguous, the damage, even if not exactly arising from severance, was at all events so much *ejusdem generis* as to come under the provision as to injuriously affecting the lands; and that the precarious tenure of the intervening land only went to the *quantum* of damage: *Holt v. Gas Light and Coke Co.* (1872), 41 L. J. Q. B. 351 (*see also* Illustration (8), on p. 324).

(c) Where a person splits up his claim for compensation into items, the jury, or other tribunal for assessing compensation, may award in respect of any one item a sum in excess of that claimed for that particular item; but whether a total sum may be awarded in excess of that claimed, *quære*.

Illustration.

In respect of damage done by a railway company in the execution of their works, the claimant sent in a claim for 270*l.*, one of the items of claim being 25*l.* in respect of a particular part of the property. During the proceedings before the sheriff and jury for assessing compensation it was stated that an error had been made in claiming only 25*l.* in respect of the item referred to, and a claim for 50*l.* was then put forward in substitution for the 25*l.* The jury gave 50*l.* in respect of that item, and assessed the total damages at 271*l.* 10*s.*, being 1*l.* 10*s.* in excess of the total amount claimed:—*Held*, that the jury were entitled to give more than the amount claimed in respect of any particular item, but that it was doubtful whether they could give a greater amount than the total claim, and

by consent judgment was entered for the claimant for 270*l.* only : *Robertson v. City and South London Ry.* (1904), 20 T. L. R. 395.

II. A jury or the arbitrators or umpire, if they arrive at the conclusion that the claimant has sustained no damage, may find the amount of compensation due to him to be nil.

Illustrations.

(1) By a railway Act it was provided that, for settling differences between the company and owners of land, the company should issue a warrant commanding the sheriff to impanel a jury to assess the amount payable "by way of satisfaction for the damages" sustained through the execution of the company's works. The company issued their warrant to the sheriff to impanel a jury "for the purpose of inquiring of, assessing, and giving a verdict for the sum of money (if any) to be paid" to C. by way of compensation. The jury found that C. had not sustained any damage, and that the amount to be assessed was *nil* :—*Held* that, even if the words "if any" had not appeared in the warrant, the jury might still have found a verdict of no damage : *R. v. Lancaster and Preston Junction Ry.* (1845), 6 Q. B. 759.

(2) The Local Board of S. made a sewer through land of which B. was the owner. B. claimed compensation. The Board contended that the land had not been damaged, and therefore that B. was not entitled to any compensation. B. called upon the board to appoint an arbitrator to determine the amount of compensation, as provided by sect. 144 of the Public Health Act, 1848. The board refused to do so. B. appointed his arbitrator, who ultimately made an award *ex parte*. On a motion to set aside the award, both parties having agreed to waive technical points, and to be bound by the decision of the Court :—*Held*, that the arbitrators, if of opinion that there was no damage, might award that the amount of compensation was *nil* : *In re Bradby and Southampton Local Board* (1855). 4 El. & Bl. 1014.

III. The amount assessed under sects. 49 and 50 is not a debt that can be garnisheed.

Illustration.

A railway company gave H. notice to treat with respect to a leasehold house, and the compensation due was assessed by a jury. After that two garnishee orders *nisi* were obtained and served upon the company :—*Held*, that the assessment of the amount due to the vendor did not bring into existence a debt due from the company to him, and that sects. 49 and 50 of the Lands Clauses Act do not have the effect of creating an absolute debt due from the company to the owner ; they are merely part of the machinery provided by the Act for ascertaining the purchase-money : *Howell v. Metropolitan District Ry.* (1881), 19 Ch. D. at p. 514.

50. The Sheriff before whom such Inquiry shall be held shall give Judgment for the Purchase Money or Compensation assessed by such Jury, and the Verdict and Judgment shall be signed by the Sheriff, and being so signed shall be kept by the Clerk of the Peace among the Records of the General or Quarter

Verdict and Judgment to be recorded.

Sessions of the County in which the Lands or any Part thereof shall be situate in respect of which such Purchase Money or Compensation shall have been awarded; and such Verdicts and Judgments shall be deemed Records, and the same or true Copies thereof shall be good Evidence in all Courts and elsewhere, and all Persons may inspect the said Verdicts and Judgments, and may have Copies thereof or Extracts therefrom, on paying for each Inspection thereof One Shilling, and for every One hundred Words copied or extracted therefrom Sixpence, which Copies or Extracts the Clerk of the Peace is hereby required to make out, and to sign and certify the same to be true Copies.

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I. Effect of verdict.

(a) In an action on the judgment the promoters may set up the defence that the claimant has no right to recover compensation at all, and it would seem that the Court, where it finds that the claimant is not entitled to the full amount assessed, can give judgment in his favour for such portion of the sum assessed as it holds he is entitled to.

Illustrations.

(1) In an action against a railway company for the sum awarded by a jury for compensation under sect. 68, the company set up the defence that the subject-matters of the claim were not such as were contemplated by the section:—*Held*, that this was a good defence: *Chapman v. Monmouthshire Ry. and Canal Co.* (1857), 27 L. J. Ex. 97.

(2) The plaintiff claimed damages, under sect. 68 of the Lands Clauses Act, by reason of his property being injuriously affected by the execution of the defendant company's works. A jury awarded the plaintiff 500*l.*; and he claimed that sum, with 287*l.* costs. The defendants pleaded (*inter alia*): (1) that the plaintiff had not suffered any damage; and (2) that he was not entitled to compensation in respect of the said injury and damage to an amount exceeding 50*l.*:—*Held*, that the company were not precluded from setting up the defence that the plaintiff was not entitled to any compensation; but that the

latter plea was bad, the plaintiff having claimed more than that sum, and a verdict for more than that sum having been found : *Read v. Victoria Station and Pimlico Ry.* (1863), 1 H. & C. 826.

(3) C. was a lessee of certain property under two leases. The leases turned out to be invalid as having been granted by the executors instead of by the heir at law of a last surviving trustee. The N. Railway Co. took the property, and compensation was awarded by a jury, viz., 1,500*l.* for the leases and 700*l.* for loss of trade :—*Held*, that C. was entitled in equity to so much of the 1,500*l.* as represented the increase in value of the fee simple from money laid out by him in improvements, which amount was to be ascertained in chambers, and also to the 700*l.* for loss of trade, and that the remainder of the 1,500*l.* should be returned to the company : *In re North London Ry., Ex parte Cooper* (1865), 34 L. J. Ch. 373.

(4) A railway company gave notice to treat to one H., the lessee of certain property, and a jury was in due course summoned to assess the value of his interest. A verdict was, by agreement, taken for 600*l.*, no separate assessments being made for the value of H.'s leasehold interest and for damage to business. The lease to H. was afterwards discovered to be invalid :—*Held*, that a reference must be made to chambers, as in *Ex parte Cooper (ante)*, to ascertain the value of H.'s true interest, of the loss of business, &c. : *In re North London Ry., Ex parte Hayne* (1865), 12 L. T. 200.

(b) A verdict cannot be set aside if the jury have acted within their jurisdiction and have had before them any materials entitling them to find such verdict (*see also* sect. 145, *post*).

Illustrations.

(1) In an action upon a judgment, following an inquisition to recover the compensation awarded, the plaintiff stated that the jury gave a verdict for 250*l.* "for the purchase of the house, and also by way of satisfaction, &c., for all damage in respect of the tenant's fixtures." The defendant pleaded that the plaintiff adduced evidence at the inquiry "not only of the loss and damage in respect of goodwill, tenant's fixtures, &c., but also of certain loss and damage in respect of the dwelling-house, by reason of the construction of the railway ; that the jurors did assess and give a verdict for the sum of 250*l.* for the purchase of the dwelling-house, and also by way of satisfaction, &c., for the several losses, &c., in the plea mentioned," whereby the inquisition, verdict and judgment were void :—*Held*, that the mere fact of the plaintiff's adducing such evidence, and the acceptance thereof by the sheriff, did not affect the validity of the verdict, for such evidence might have been given to show that the house had been deteriorated, and this was necessary to give jurisdiction : *Corrigal v. London and Blackwall Ry.* (1843), 5 Man. & G. 219.

(2) An action was brought upon a judgment, following upon an inquisition found before a sheriff, to recover 400*l.*, the amount of compensation awarded to the plaintiff. The defendant company endeavoured to show, by way of defence, that the jury awarded, in respect of the diversion of the water which flowed through the plaintiff's premises, damages in respect of the whole stream diminished, the plaintiff having a right to compensation only in respect of the diminution of a part of it, and that in so awarding the jury committed an excess of jurisdiction :—*Held* that, if there was any excess of jurisdiction committed in determining the amount of compensation, the company were entitled to move for a *certiorari* to bring up the inquisition, but that they could not dispute the inquisition in an action upon the judgment following it : *Mortimer v. South Wales Ry.* (1859), 1 El. & El. 375.

(3) "If the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone because the jury may have awarded too much, or because the under-sheriff had over-stated or under-stated the result of the evidence given": *per* Lord Halsbury, C., in *Cowper Essex v. Acton Local Board* (1889), 14 App. Cas. at p. 160.

(4) The tenant of a public-house claimed compensation by reason of the injurious affection of his property by certain street improvements carried out by the defendants. The jury awarded 1,031*l.* as compensation. Upon an action being brought to recover this amount, the defendants contended that the inquisition was bad, as it found wholly or to a great extent money due to the plaintiff for loss of profits, which was not the proper subject of compensation:—*Held*, that there was jurisdiction to entertain the question of diminution of value through the access to the house being rendered less easy, and that the verdict ought not to be disturbed, although evidence had wrongly been admitted as to loss of trade and decrease in the value of the lease: *Metropolitan Board of Works v. Howard* (1889), 5 T. L. R. 732.

(5) "A preliminary point made on behalf of the railway company is that if either of the two claims made by the plaintiffs in the proceedings before the sheriff cannot be supported, then, inasmuch as the award is for a lump sum, and does not distinguish between the two claims, it is bad altogether. Dealing first with that contention, it seems to me to rest on a misconception. The authority on which it is supported is an authority on an award, which is quite a different thing in its nature and results from an inquisition before a sheriff's jury. . . . But a series of cases have been cited in which the like question arose, not on an award, but on an inquisition, in which it appeared that claims had been made that might be legally the subject of compensation, and other claims that could not be. It was admitted that it was not possible on the face of the verdict to distinguish how much had been given in each class of claim, or indeed to say whether compensation had been given in respect of one class of claim only. Nevertheless, in a series of cases of which the *Metropolitan Board of Works v. Howard* (*supra*), which went to the House of Lords, is the chief, it was decided that no objection could be taken ultimately at the hearing of an action to recover the compensation awarded by the verdict of the sheriff's jury, the proper course being in such a case to bring up the inquisition to quash it. Other cases were cited in support of this view, one being *Mortimer v. South Wales Ry.* (*supra*), as far back as 1859, and itself resting on the prior decision in *Corrigal v. London and Blackwall Ry.* (*supra*). Therefore it seems to me to start with, that if one of the two claims is capable of being supported, it is immaterial that there was another which cannot be supported in point of law": *per* Collins, M.R., in *Long Eaton Recreation Grounds v. Midland Ry.*, [1902] 2 K. B. at pp. 579, 580.

(c) There must be enough upon the face of the proceedings to show the existence of jurisdiction, otherwise they will be liable to be quashed.

Illustrations.

(1) An inquisition taken under a railway Act recited that notice had been given to the party that his lands were required by the company for the purposes of the Act, and that he had not within twenty-one days afterwards agreed with the company for the sale of them; and also that fourteen days' notice had been given of the time and place of the inquiry before the sheriff:—*Held*, in ejectment by this party against the company for these lands afterwards taken by them under the Act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been

subscribed; but that if this were the fact, it should come by way of answer from the plaintiff: *Doe d. Payne v. Bristol and Exeter Ry.* (1840), 6. M. & W. 320.

(2) A railway company, acting under statutory powers, gave notice to treat to the owners and occupiers of certain premises, and afterwards issued a warrant for the summoning of a jury to assess the value of the owner's interest. The jury were impanelled and in due course assessed the amount of compensation, the owner attending and protesting that the company had no right to take his lands, as not being included in the schedule to their Act. An inquisition was made, purporting to be taken "pursuant to the Act, on the oaths of jurors duly impanelled, in pursuance of the warrant to the inquisition annexed, who assessed the sum to be paid for the property particularised in the warrant, and authorised by the Act to be taken for the railway, whereupon the sheriff, in pursuance of the Act, gave judgment for that sum." Neither in the warrant nor in the inquisition was it stated that the owner had refused to treat, or that he had not agreed with the company for the sale of his land, nor that the company had served on him the notice required by the Act to be given, but it appeared from another source that he did not agree with the company and that he had received the requisite notices:—*Held*, that enough facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury: *Taylor v. Clemson* (1844), 11 Cl. & F. 610. "The principal point raised refers to an inquisition which was taken under a local Act, 6 & 7 Will. IV. c. cxi., for making a railway between Manchester and Leeds; and the main ground of the objection taken here . . . is that the jurisdiction of the Court, the sheriff and jury, which took the inquisition and gave judgment upon it, is not duly set forth, so that this Court, and the Courts of Queen's Bench and Exchequer Chamber, have no means of knowing that the inferior Court had the jurisdiction which it exercised. Now it cannot be doubted that where a Court of limited jurisdiction, limited either in point of place or of subject-matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises": *per* Lord Brougham at p. 640, *ib.*

(d) The verdict is bad if anything beyond the amount of compensation due to the claimant has been found and included therein (*see* sect. 145, *post*).

(e) A new trial cannot be obtained by means of an application for a *mandamus* directing the issue of a new precept.

Illustration.

In a case where F. claimed 500*l.* as compensation, and the jury found a verdict in his favour for 49*l.*, an attempt was made to obtain a new trial by means of a *mandamus* commanding the issue of a new precept, on the ground of misdirection, improper rejection of evidence, and of the verdict being against the weight of the evidence, and altogether inadequate. The application was refused, Coleridge, J., holding that, to direct the issue of a new precept would only be doing a thing indirectly which could not be done directly: *R. v. Eastern Counties Ry.* (1843), 3 Rail. Cas. 466.

(f) The Court has no power to grant a new trial of an issue directed under sect. 41 of the Regulation of Railways Act, 1868, to determine the right of compensation for lands taken for the purposes of a railway.

Illustration.

The defendants gave notice of their intention to take certain lands of the plaintiffs for the purposes of their railway. An order was made under sect. 41 of the Regulation of Railways Act, 1868, directing an issue to determine the amount of compensation to be awarded to the plaintiffs, and at the trial judgment was given for the amount of the verdict. A motion for a new trial was made on behalf of the defendants:—*Held*, that there was no jurisdiction to order a new trial in such cases: *Birmingham Land Co. v. London and North-Western Ry.* (1889), 22 Q. B. D. 435 (see also *ante*, p. 246).

II. Proof of verdict.

(a) If a verdict has not been recorded as it ought to have been, according to the statutory provision in that behalf, the officer who presided at the inquiry may be called to prove the verdict, and the grounds on which it was found.

Illustration.

A railway Act provided that the verdicts and judgments relating to matters of compensation arising under the Act should, after signature by the officer presiding, be deposited with and kept by the clerk of the peace among the records of quarter sessions, and should be deemed records to all intents and purposes. In a case where it was proved that the verdict had never been recorded under this provision, parol evidence of it, and of the grounds on which it proceeded, was admitted: *Manning v. Eastern Counties Ry.* (1843), 3 Rail. Cas. 637.

(b) The due recording of the verdict and judgment is not, it seems, a condition precedent to their validity.

Illustration.

By an Act 9 & 10 Vict. c. 38, the Commissioners of Woods and Forests were empowered to form a park at Battersea, and to take lands for the purpose. By sect. 23 of the Act, after the jury had ascertained the amount of compensation, the sheriff "shall thereupon order the sum" to be paid by the Commissioners to the landowner:—*Held*, that the sheriff, after ordering the payment of the sum assessed, was *functus officio*; and that the payment of the money into the Bank of England was an act belonging to the executive Government, and not the subject of prohibition: *Chabot v. Morpeth (Viscount)* (1850), 15 Q. B. 446.

III. The section does not, it seems, give the proceedings before the jury an effect analogous to that of a Court of record.

Illustration.

Where a local and personal Act provides that the verdict and judgment of the sheriff and the jury by whom compensation had been assessed were to be deemed "records to all intents and purposes":—*Held*, the Act did not give the proceedings an effect analogous to that of a Court of record: *R. v. Manchester and Leeds Ry.* (1838), 8 A. & E. 413, 428.

Costs of the
Inquiry how to
be borne.

51. On every such Inquiry before a Jury, where the Verdict of the Jury shall be given for a greater Sum than the Sum previously offered by the Promoters of the Undertaking, all the Costs of such Inquiry shall be borne by the Promoters of the Undertaking ; but if the Verdict of the Jury be given for the same or a less Sum than the Sum previously offered by the Promoters of the Undertaking, or if the Owner of the Lands shall have failed to appear at the Time and Place appointed for the Inquiry, having received due Notice thereof, One Half of the Costs of summoning, impannelling, and returning the Jury, and of taking the Inquiry and recording the Verdict and Judgment thereon, in case such Verdict shall be taken, shall be defrayed by the Owner of the Lands, and the other Half by the Promoters of the Undertaking, and each Party shall bear his own Costs, other than as aforesaid, incident to such Inquiry.

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I. Scope of sect. 51.

(a) The words "all the costs of such inquiry" refer to inquiries held under sect. 68 as well as to those where notice to treat has been given.

Illustrations.

(1) The plaintiff brought an action to recover 215*l.*, the amount assessed by a jury as compensation under sect. 68 of the Lands Clauses Act, for injuries affecting his lands caused by the works of the defendant company, together with the costs, 243*l.* The defendant company demurred to the right to recover costs :—*Held*, that the plaintiff was entitled to his costs, sect. 68 providing that, if a party chooses to have the claim settled by a jury, a warrant is to be issued by the company to the sheriff "to summon a jury for settling the same in the manner herein provided," and there being no subsequent provision for summoning a jury, sect. 51 (*inter alia*) clearly applies to sect. 68 : *South-Eastern Ry. v. Richardson* (1852), 21 L. J. C. P. 122.

(2) H. claimed from a railway company 500*l.* for injurious affecting of his premises and 286*l.* for loss of business. The promoters (a railway company) offered him 70*l.* damages for

injurious affection and 30*l.* for loss of business. This offer was refused. A warrant for a jury to assess the compensation was issued; and at a later date the company made a fresh offer of 100*l.* for injurious affection and 50*l.* for loss of business. The jury, at the hearing, awarded H. 50*l.* for "structural damage" and 100*l.* for loss of business. H. delivered his bill of costs, with an appointment to tax. At the taxation the master objected that H. was not entitled to costs, having failed to recover more than the amount of the second offer:—*Held*, that the master was right; and that sect. 51 is incorporated with sect. 68, but that sect. 38 is not: *Hayward v. Metropolitan Ry.* (1864) 33 L. J. Q. B. 73.

(3) See *Bray v. South-Eastern Ry.*, p. 276, *post*.

(b) Inquiries held under the provisions of sect. 94 are not within sect. 51 (*see* sect. 94, *post*).

(c) The costs of "such inquiry" in sect. 52 refer to the inquiry mentioned in the earlier part of this section (*see* cases referred to in sect. 52, *post*).

(d) The "sum previously offered" refers to the offer under sect. 38 (*see* sect. 38, *ante*).

II. When claimant is not entitled to costs.

Sect. 51 does not apply where the promoters have made no offer and are under no liability to pay compensation.

Illustration.

T. agreed with a railway company to sell to them certain messuages required for the railway, and it was also agreed that the purchase-money should be taken in satisfaction for any damage by severance and injury to the adjacent property belonging to T. and also for any injurious affecting of such property. The property was afterwards conveyed by T. Structural injury to T.'s adjacent messuages having been caused by the execution of the company's works, T. obtained compensation by proceeding under sect. 68 of the Lands Clauses Act, and afterwards sued to recover the amount assessed and the costs of the inquisition. The defendants pleaded satisfaction and discharge under the agreement:—*Held*, that sect. 51 of the Lands Clauses Act does not apply to a case where the promoters have made no offer, and are under no liability to pay compensation: *Todd v. Metropolitan District Ry.* (1871), 24 L. T. 435. "As to the costs of the inquisition, an ingenious point was raised by Mr. Mead; but I think, upon reading the 51st section with the rest of the Lands Clauses Consolidation Act, the intention of the Legislature appears to have been to give the owner of land the costs when the company have offered a sum less than that which the jury assess, but not under circumstances like these, when the company have made no offer at all and are not liable for anything": *per* Bovill, C.J., at p. 439, *ib.*

III. Enforcing payment of costs.

The right of action for costs accrues before the ministerial function of taxation is fulfilled.

Illustration.

"In the result, it seems to me that there is now a declaration by the Legislature that upon the decision of the arbitrator on a matter in difference between the parties, the right to costs accrues to the successful party, and also a ministerial duty to ascertain the amount of those costs. Applying this view, and the principle of *Holdsworth v. Wilson* (1863), 4 B. & S. 1, to the state of facts before me, I think that there is authority for saying that the right to costs which springs from the decision of the arbitrator is established by the statutes, and the moment that the right to the costs is declared, the cause of action accrues, and that all which remains to be done is a ministerial ascertainment of the amount. The right to the costs accrues before the ministerial function is fulfilled, and may be enforced by action, as was done in *Holdsworth v. Wilson*": *per* Brett, L.J., in *Sharpe v. Metropolitan District Ry.* (1879), 4 Q. B. D. at p. 651. Affirmed in the House of Lords (1880), 5 App. Cas. 425; see *ante*, p. 230.

Particulars of the Costs. **52.** The Costs of any such Inquiry shall, in case of Difference, be settled by One of the Masters of the Court of Queen's Bench of *England* or *Ireland*, according as the Lands are situate, on the Application of either Party, and such Costs shall include all reasonable Costs, Charges, and Expenses incurred in summoning, impannelling, and returning the Jury, taking the Inquiry, the Attendance of Witnesses, the Employment of Counsel and Attornies, recording the Verdict and Judgment thereon, and otherwise incident to such Inquiry.

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I. Under special Acts passed before the Lands Clauses Act, if there was no direction as to costs none were allowed. This rule still applies if the special Act excludes the operation of the Lands Clauses Act.

Illustrations.

(1) A private Act gave compensation to the owners of land over or through which a water company constructed their works, and also gave them the costs of the assessment

of compensation by a jury. By a subsequent provision compensation was given to other persons sustaining damage by reason of the construction of the company's works, but the Act was silent as to the costs incident to the jury :—*Held*, that a person in whose favour compensation had been assessed under the latter provision was not entitled to costs : *Ex parte Turner* (1839), 1 W. W. & H. 305.

(2) By a railway Act it was provided that if the jury gave the same or a greater sum than the company had previously offered, the company should pay all the costs of the inquisition ; if less than had been previously offered, that each party should pay half the costs ; and that if by reason of absence abroad or any other disability, any person should have been prevented from treating with the company, the latter should pay all the costs. A later Act was silent as to costs :—*Held*, that a person proceeding under the later Act, in a case outside the provisions of the earlier, was not entitled to costs : *Corrigal v. London and Blackwall Ry.* (1843), 5 Man. & G. 219.

(3) Sect. 19 of the Defence Act, 1842 (5 & 6 Vict. c. 94), empowered the principal officers of the Ordnance to contract for the purchase of land, and that it should be lawful for them to take possession upon obtaining the warrant of two or more justices ; and thereafter a jury was to be summoned who should “find the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments or for the possession or use thereof” :—*Held*, that these words were not wide enough to include the costs and expenses of the inquiry : *In re Laws* (1847), 1 Ex. 441.

II. Meaning of “such inquiry.”

(a) The words “such inquiry” in sect. 52 refer to the inquiry mentioned in the earlier part of sect. 51 ; hence, if a verdict is found for the same sum as, or a less sum than, that offered by the promoters, they will be entitled to one-half only of the costs of the hearing, and to none of those of counsel, solicitor, or witnesses.

Illustration.

A railway company gave B. notice to treat, and at the same time offered 1,000*l.* for his estate and interest in the land. B., however, claimed double that amount. The company issued their warrant to the sheriff, and the jury found for the sum of 1,000*l.* Upon the taxation before the master, he refused to tax to the company any costs anterior to those of summoning, impannelling and returning the jury. He also refused to tax any costs in respect of counsel, attorney, or other expenses beyond the sheriff's charges and expenses of the jury and those attendant upon the taxation :—*Held*, that the master had put a correct construction upon sect. 52 of the Lands Clauses Act, as the expression “costs of any such inquiry” in that section refers to the inquiry mentioned in the earlier part of sect. 51 : *Bray v. South-Eastern Ry.* (1849), 7 D. & L. 307.

(b) Where an inquisition has been quashed the claimants are entitled not only to the costs of the successful inquiry, but also to those of the abortive inquiry and of the proceedings to set it aside.

Illustration.

A warrant was issued to the sheriff and an inquiry as to damages held to assess compensation due to the claimants. The under-sheriff having misdirected the jury, the

inquisition was set aside and a second inquiry held:—*Held*, that the claimants were entitled to their costs, not only of the successful inquiry, but also of the abortive inquiry, and also of those of the proceedings to set aside the first inquisition: *R. v. Manley Smith*, (1881) 30 W. R. 272.

NOTE.—In the following case, decided before the Lands Clauses Act, the cost of the abortive proceedings was not in the special circumstances thrown upon the promoters.

Illustration to Note.

A jury having been summoned by the sheriff, under the provisions of a railway Act, at the instance of a party who claimed compensation for an alleged injury to his premises, the sheriff was of opinion that the claim was not within the Act, and dismissed the jury. A *mandamus* was afterwards made absolute, commanding the sheriff to summon another jury, on the ground that his decision was wrong:—*Held* that, the mistake being in the presiding judge, the party was not entitled to costs against the company: *Walker v. London and Blackwall Ry.* (1843), 7 Jur. 1154.

III. What is included in the term “costs.”

(a) When the verdict is for a sum not greater than that previously offered, the claimant is not entitled to the costs of the order for the *mandamus* directing a jury to be summoned.

Illustration.

A notice to treat was served upon O'D., and afterwards a *mandamus* was obtained directing a jury to be summoned, and an inquiry was held to assess the compensation due to O'D., who had claimed 1,010*l.*, the promoters offering 692*l.* The jury awarded him 537*l.*:—*Held* that, a sum smaller than that offered having been recovered, the claimant was not entitled to the costs of the *mandamus* directing a jury to be summoned, or of the writ: *R. v. Waterford and Limerick Ry.* (1849), 13 Ir. L. R. 272.

(b) “All costs and expenses of summoning and returning such jury and taking such verdict, and of summoning and attendance of witnesses.”

Somewhat similar words in special Acts have been construed in the following cases:—

Illustrations.

(1) A local Act empowered certain trustees to purchase, and enacted that if the owners should not agree with the trustees on the terms, or should neglect or refuse to treat or were prevented by any cause from treating, the trustees should cause a jury to be summoned by the sheriff to assess compensation, and the sheriff should summon and examine witnesses upon oath: and if the jury should give a verdict for more than the trustees had offered, the costs and expenses of summoning and returning such jury and witnesses *and of the inquest*, to be settled by a justice, were to be borne by the trustees, and recovered by the persons entitled thereto, by distress; but if the verdict should not be for more than the sum offered, the trustees were to bear one moiety of such costs and expenses, and the owners the other moiety, but where parties from absence or inability could not treat or agree, such costs and expenses were to be borne by the trustees:—*Held*, that an owner of lands to be purchased, to whom a jury awarded more than the sum offered, was entitled to the costs of the inquiry, including witnesses, attendance by attorney

at the inquest, conferences and briefs, and not merely to the expenses of the sheriff and jury, but that the expenses of surveyors, merely as such, could not be included in the costs: *R. v. York (City) Justices* (1834), 1 A. & E. 828; 40 R. R. 449.

(2) By a railway Act it was provided that if the jury should award a sum higher than that offered, "all the costs of summoning such jury, and the expenses of witnesses," should be paid by the company; if for a less sum, then one moiety of such costs by each side. Another section provided that all parties disputing with the company and demanding to have compensation assessed by a jury should enter into a bond to pay their proportion, if any, "of the costs and expenses of summoning and returning such jury and taking such verdict, and of the summoning and attendance of witnesses":—*Held*, that these clauses did not entitle the successful party to general costs of the inquiry, such as might be recovered in an action, after verdict; not, therefore, to the costs of drawing brief, counsel's fee, solicitor's charges for attending the inquiry, or surveyor's charges (except an allowance for time and travelling expenses), for viewing and valuing: *R. v. Gardner* (1837), 6 A. & E. 112.

(3) Where a railway Act provided that, in certain events, the promoters should pay all the costs of summoning and returning the jury, the expenses of witnesses and taking the verdict:—*Held*, that the claimant was not thereby entitled to the costs of attorney's letters and attendances, or to the expenses of plans, &c., paid to surveyors: *R. v. Warwickshire (Sheriff)* (1841), 2 Rail. Cas. 661.

IV. Power of master with respect to taxation.

(a) A master has no jurisdiction under sect. 52 to tax between solicitor and client the costs incident to an inquiry.

Illustration.

On a motion for an order that the master should tax certain bills of costs relating to inquiries before juries under the Lands Clauses Act as between solicitor and client:—*Held*, that the Court had no jurisdiction to make such an order: *O'Farrell v. Limerick and Waterford Ry.* (1849), 13 Ir. L. R. 365.

(b) Where a claimant to whom no offer has been made obtains by consent a verdict for a sum as compensation, the Court has no jurisdiction to order the costs to be taxed.

Illustration.

Notice to treat was served upon M. by a railway company, and afterwards a jury was summoned to assess the compensation due to him. A verdict was taken by consent for 160*l.* No offer had been made by the company:—*Held*, that the Court had no jurisdiction, under the special Act which applied to the matter, to direct a taxation of M.'s costs: *Maier v. Southern and Western Ry.* (1849), 13 Ir. L. R. 364.

(c) A Chancery taxing master has jurisdiction to tax the costs of an inquiry to assess compensation under the Lands Clauses Act.

Illustration.

An inquiry was held before a sheriff and jury as to compensation payable by the defendants for lands taken by them under the Lands Clauses Act. At the inquiry the

jury, by consent, returned a verdict for 9,750*l.* and costs. The costs were taxed by a Chancery taxing master :—*Held*, that he had power to do so : *Corington v. Metropolitan District Ry.* (1902), 72 L. J. K. B. 93.

V. If the taxing master refuse to exercise his jurisdiction, the Court will, in a proper case, grant a mandamus compelling him to proceed.

Illustrations.

(1) The claimants sought to make a railway company pay not merely the costs of proceedings before the jury, which resulted in the assessment of compensation, but also the costs of certain abortive proceedings before the jury. The master refused to tax the costs :—*Held*, that a *mandamus* should issue requiring him to tax same, as the railway company was liable in respect thereof : *R. v. Manley Smith* (1882), 30 W. R. 272.

(2) Notice to treat was given by promoters, who subsequently gave notice of entering under sect. 85; they made a deposit and gave a bond, but did not actually enter. The claimant required the promoters to give notice within ten days for the summoning of a jury. An offer was then made by the promoters of a sum as compensation, which was declined by the claimant. The promoters then issued their warrant, and the jury assessed compensation at a less sum than that previously offered :—*Held*, that the claimant was entitled to his costs, as the proceedings were governed by sect. 38, and not by sect. 68, and that a *mandamus* should issue directing the taxing master to tax the costs : *R. v. Manley Smith, In re Church and London School Board* (1892), 67 L. T. 197.

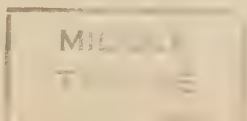
VI. The Court has no jurisdiction to review the taxation by a master under sect. 52.

Illustrations.

(1) "We are asked . . . to review certain things done by the master, no appeal being given to this Court by the Act of Parliament referred to [the Lands Clauses Act]; and thus constructively we are called on to perform a duty which has been imposed on the officer. That duty is thrown on him, not as the officer of the Court, but under the specific directions of that Act of Parliament. The Court have no jurisdiction, there being neither matter nor cause in Court" : *per* Blackburne, C.J., in *Tennant v. Belfust Corporation* (1847), 11 Ir. L. R. at p. 291.

(2) "Where the Court refers the taxation to its officer, it has the power of reviewing it, because the power of the officer is delegated to him by the Court, and his act is not effective unless adopted by the Court. But the taxation in question is made without any delegation of power from the Court, and without any express or implied liability to review. Where the Legislature intended the Court to have the control over the taxation, it has directed such Court to award costs. See sect. 80 as to costs where the money has been deposited; sect. 83 as to costs of conveyance; sect. 126 as to costs of litigating a title:" *per* Erle, J., in *Ross v. York, Newcastle and Berwick Ry.* (1849), 5 Rail. Cas. at p. 519.

(3) "In *Ross v. York, Newcastle and Berwick Ry.* (*supra*) I held in the Bail Court, that, where costs have been settled by the master under this section [52], the Court has no power to order a review of the taxation,—the costs being by that section referred to the master, not as an officer of the Court, but as an independent arbitrator. . . . I remember, however, a case in the Full Court, in the time of Lord Denman (of which I find no report), where it was considered, that, the master being an officer of the Court, the exercise of whose duties is subject to certain known incidents, his *allocatur* must be subject to review. It is true, that in the performance of this particular duty, he is



deputed by Parliament and not by the Court ; but I believe I have the sanction of the other members of the Court for saying that this latter view is in accordance with the law": *per* Erle, C.J., in *Metropolitan Ry. v. Turnham* (1863), 14 C. B. N. S. at pp. 223, 224.

(4) A private Act provided that the costs might be settled by a "master of a Superior Court of Law":—*Held*, that such master taxed as *persona designata*, and that there was no power to review his taxation: *In re Sheffield Waterworks Act*, 1864 (1865), L. R. 1 Ex. 54.

(5) Rule calling on the claimant to show cause why the master should not review his taxation of costs under sect. 52:—*Held*, that the rule must be discharged, as the Court had no jurisdiction to interfere in the manner suggested: *Owen v. London and North-Western Ry.* (1867), L. R. 3 Q. B. 54.

(6) Certain lands of charity trustees were taken by a railway company, and it was arranged that the compensation should be settled by arbitration under the Lands Clauses Act. The costs were taxed by the master under sect. 1 of the Lands Clauses Act, 1869 [repealed and replaced by sect. 1 of the Lands Clauses (Taxation of Costs) Act, 1895]:—*Held*, by the Court of Appeal, that the Court had no jurisdiction over the master's taxation on a motion to review: *In re Sundback Charity Trustees and North Staffordshire Ry.* (1877), 3 Q. B. D. 1.

53. If any such Costs shall be payable by the
Payment of Costs. Promoters of the Undertaking, and if within Seven Days after Demand such Costs be not paid to the Party entitled to receive the same, they shall be recoverable by Distress, and on Application to any Justice he shall issue his Warrant accordingly: and if any such Costs shall be payable by the Owner of the Lands or of any Interest therein, the same may be deducted and retained by the Promoters of the Undertaking, out of any Money awarded by the Jury to such Owner, or determined by the Valuation of a Surveyor under the Provision herein-after contained; and the Payment or Deposit of the Remainder, if any, of such Money shall be deemed Payment and Satisfaction of the whole thereof, or if such Costs shall exceed the Amount of the Money so awarded or determined, the excess shall be recoverable by Distress, and on Application to any Justice he shall issue his Warrant accordingly.

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I. The allocatur of the master is final with respect to the costs, and the justice has no discretion to inquire into same.

Illustration.

T., the lessee of certain premises, claimed compensation under sect. 68 of the Lands Clauses Act, and a jury was summoned to assess the compensation due to him. Eight days before the inquiry the defendant railway company offered T. 25%. The jury found a verdict for 20%. T. claimed the whole of his costs; the company contended that they were entitled to one-half of the costs of summoning, impanelling and returning the jury, and of taking and recording the verdict and judgment. The master held that T. was entitled to the whole of his costs, and gave his *allocatur* for 106%. The company refusing to pay these costs, T. applied to a magistrate under sect. 53 of the Lands Clauses Act:—*Held*, that the master's *allocatur* was final, and that T. was entitled to the warrant under sect. 53: *Metropolitan Ry. v. Turnham* (1863), 14 C. B. N. S. 212.

II. The method of recovering costs pointed out in the section must be followed before having recourse to any other mode.

Illustration.

By a railway Act a company was empowered to take lands, making compensation to the owners, such compensation, in case of disagreement, to be assessed by a sheriff's jury. By sect. 27, if the jury should give a verdict for a like or greater sum than had been offered by the company, the costs of the inquiry should be defrayed by the company, and such costs should be determined by the sheriff, and, in default of payment, were to be recoverable by distress. By sect. 37 the costs of deducing title to any lands purchased or taken were to be borne by the company; and by sect. 38, in case of disagreement as to amount, the same should be ascertained by the Court of Exchequer, who might refer them to a master for taxation, and thereafter order the amount to be paid:—*Held*, that an application for a *mandamus* to the company commanding them to pay the costs of the assessment of compensation and the costs of title to lands purchased by the company, such costs not having been settled by the sheriff, was at all events premature until the costs of the inquiry had been ascertained by the sheriff and attempted to be levied by distress, in the mode pointed out in the Act: *R. v. London and Blackwall Ry.* (1845), 4 Rail. Cas. 119.

Special Jury to be summoned at the Request of either Party.

54. If either Party desire any such Question of disputed Compensation as aforesaid to be tried before a Special Jury, such Question shall be so tried, provided that Notice of such Desire, if coming from the other Party, be given to the Promoters of the Undertaking before they have issued their Warrant to the Sheriff; and for that Purpose the Promoters of the Undertaking shall by their Warrant to the Sheriff require him to nominate a Special Jury for such Trial; and thereupon the Sheriff shall, as soon as conveniently may be after the Receipt by him of such Warrant, summon both the Parties to appear before him,

by themselves or their Attornies, at some convenient Time and Place appointed by him for the Purpose of nominating a special Jury (not being less than Five nor more than Eight Days from the Service of such Summons); and at the Place and Time so appointed the Sheriff shall proceed to nominate and strike a Special Jury, in the Manner in which such Juries shall be required by the Laws for the Time being in force to be nominated or struck by the proper Officers of the Superior Courts, and the Sheriff shall appoint a Day, not later than the Eighth Day after striking of such Jury, for the Parties or their Agents to appear before him to reduce the Number of such Jury, and thereof shall give four Days Notice to the Parties; and on the Day so appointed the Sheriff shall proceed to reduce the said Special Jury to the Number of Twenty in the Manner used and accustomed by the proper Officers of the Superior Courts.

The service of a notice of desire for a special jury under sect. 54 is not a waiver of a notice previously given under sect. 68 so as to entitle the company to an extension of the period of twenty-one days for issuing their warrant.

Illustration.

Notice was given to a railway company by G. claiming compensation above 50% in amount, and desiring to have the question decided by a jury. G. afterwards gave notice of his desire to have a special jury empanelled to try the question. The company failed to issue their warrant for a jury to the sheriff within twenty-one days of the first notice:—*Held*, that the twenty-one days could not be computed from the date of the later notice nor could the time be extended, and that therefore G. was entitled to recover the amount claimed: *Glyn v. Aberdare Valley Ry.* (1859), 6 C. B. N. S. 359.

Deficiency of
Special Jurymen.

55. The Special Jury on such Inquiry shall consist of Twelve of the said Twenty who shall first appear on the Names being called over, the Parties having their lawful Challenges against any of the said Jurymen; and if a full Jury do not appear, or if after such Challenges a full Jury do not remain, then, upon the Application of either Party, the Sheriff shall add to the List of such Jury the Names of any other disinterested Persons qualified to act as Special or Common jurymen, who shall not have been previously struck off the aforesaid List, and who may then be attending the

Court, or can speedily be procured, so as to complete such Jury, all Parties having their lawful Challenges against such Persons; and the Sheriff shall proceed to the Trial and Adjudication of the Matters in question by such Jury, and such Trial shall be attended in all respects with the like Incidents and Consequences, and the like Penalties shall be applicable, as herein-before provided in the Case of a Trial by Common Jury.

The fact that some of the supplemental jurors are not qualified is only a ground for challenge, and the Court will not set aside a verdict where such jurors have not been challenged.

Illustration.

An inquisition was taken before the sheriff under the Lands Clauses Act. A special jury had been summoned under sect. 55, but when the case was called on only six special jurors appeared. The under-sheriff, upon the application of the parties, proceeded to obtain a full jury. There being no jurors among the by-standers, he went into the town of K. and forthwith summoned six other jurors, who were thereupon impannelled and duly sworn, and a verdict was given. It was subsequently ascertained that two of the persons who so acted were not on the special jury list, and one of them had not even the qualification required to be a special juror:—*Held*, that the exercise of the right of challenge was the appropriate remedy, as the jurors could have been examined as to their qualification: and that the Court could not interfere, especially as the objection was more a matter of form than of substance: *In re Chelsea Waterworks, Ex parte Phillips* (1885), 24 L. J. Ex. 79.

NOTE.—“ It does not appear that a challenge to the array is given by sect. 54 or 55 ” of the Lands Clauses Act: *per Coleridge, J.*, in *Cooling v. Great Northern Ry.* (1850), 15 Q. B. at p. 496.

As to striking of jury, *see* sect. 42, *ante*.

Other Inquiries
before same
Special Jury
by Consent.

56. Any other Inquiry than that for the Trial of which such Special Jury may have been struck and reduced as aforesaid may be tried by such Jury, provided the Parties thereto respectively shall give their Consent to such Trial.

Juryman not to
attend more than
once a Year.

57. No Juryman shall, without his Consent, be summoned or required to attend any such Proceeding as aforesaid more than once in any Year.

Compensation to
absent Parties
to be determined
by a Surveyor
appointed by
Two Justices.

58. The Purchase Money or Compensation to be paid for any Lands to be purchased or taken by the Promoters of the Undertaking from any Party who, by reason of Absence from the Kingdom, is prevented from treating, or who cannot after diligent Inquiry be found, or who shall not appear at the Time appointed for the Inquiry before the Jury as hereinbefore provided for, after due Notice thereof, and the Compensation to be paid for any permanent Injury to such Lands, shall be such as shall be determined by the Valuation of such able practical Surveyor as Two Justices shall nominate for that Purpose as herein-after mentioned.

This section does not apply unless the "party"—(a) is prevented from treating by absence from the United Kingdom; or (b) cannot after diligent inquiry be found; or (c) shall not appear at the time appointed for the inquiry before the jury. In other cases the value should be ascertained by the verdict of a jury, or by the award of an arbitrator.

Illustration.

A railway company gave notice to treat to F., R. and S., as trustees of the poor of a parish, and afterwards deposited the estimated value of the property, executed a bond, and took possession. Some time after, M. gave notice that he claimed an interest as lord of the manor, and thereupon notice to treat was served upon him also, and, having ascertained the value of M.'s interest as well as that of the trustees, the company paid the amount thereof into court, and gave another bond. Owing to doubts as to the true ownership, application was made by the company to two justices under sect. 59; and the amount so assessed was deposited in the bank and a deed-poll executed under sects. 75 and 76 (*post*). The company then presented a petition for payment out of the two sums previously deposited:—*Held*, that the petition must be dismissed, for the provisions of the Act had not been complied with, inasmuch as the compensation due had not been ascertained by the verdict of a jury or award of an arbitrator: *Ex parte London and South-Western Ry.* (1869), 38 L. J. Ch. 527.

59. Upon application by the Promoters of the Undertaking to Two Justices, and upon such Proof as shall be satisfactory to them that any such Party is, by reason of Absence from the Kingdom, prevented from treating, or cannot after diligent Inquiry be found, or that any such Party failed to appear on such Inquiry before a Jury as aforesaid, after due notice to him for that Purpose, such Justices shall, by Writing under their Hands, nominate an able practical Surveyor for determining such Compensation as aforesaid, and such Surveyor

Two Justices to
nominate a
Surveyor.

shall determine the same accordingly, and shall annex to his Valuation a Declaration in Writing subscribed by him of the Correctness thereof.

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I. It is not essential that a description of the precise lands to be taken should be inserted in the document appointing the surveyor.

Illustration.

"I am of opinion that, as it has been provided by the Act of Parliament that in case of any dispute between the parties a surveyor should be appointed, it was quite sufficient that he should know what he had to survey, and that the Act does not require that a description of the precise lands to be taken should be inserted in the appointment. It was the duty of the parties interested, in order to prevent misunderstanding, to see that the surveyor's valuation related to the lands in dispute, because, if it were of any other lands, the valuation would be worth nothing" : *per* Shadwell, V.-C., in *Poynder v. Great Northern Ry.* (1847), 5 Rail. Cas. at p. 200.

II. The justices ought not to nominate a surveyor who has been employed by the promoters, and who has already in the course of such employment valued the land required, but the fact that such a surveyor has been nominated does not of necessity invalidate his acts.

Illustration.

A railway company served notice to treat upon L., and, pending the assessment of the compensation by a jury, they caused one S., a surveyor who had already been employed by them to value the lands in question, to be appointed by two justices under sects. 59 and 85 of the Lands Clauses Act. They afterwards paid into the bank the amount of S.'s valuation, executed a bond, and took possession. It was objected that S. ought not to have been appointed :—*Held* that, although the company ought not to have appointed their own surveyor, an injunction could not on that ground be granted restraining the taking of possession : *Langham v. Great Northern Ry.* (1847), 1 De G. & Sm. 486.

III. The surveyor is bound to make a fair and proper inspection of the lands in question.

Illustration.

"It was said that the surveyor had never examined the premises in such a manner as to enable him to form a fair judgment, having in fact never entered the house, but that he had merely inspected the exterior, which could not be satisfactory. No doubt there might be houses of precisely the same dimensions externally, which might nevertheless be of a totally different value, and the knowledge of that fact would depend principally upon an inspection of the interior ; one house might be in good repair, and the other not, and there were many other considerations. It therefore appeared to him that there had not been the means used by the surveyor, which he was bound to use, to make a fair estimate" : *per* Kindersley, V.-C., in *Cotter v. Metropolitan Ry.* (1864), 10 L. T. at p. 778.

Declaration to be
made by the
Surveyor.

60. Before such Surveyor shall enter upon the Duty of making such Valuation as afore-said he shall, in the Presence of such Justices, or One of them, make and subscribe the Declaration following at the Foot of such Nomination ; (that is to say,)

‘ I *A. B.* do solemnly and sincerely declare, That I will ‘ faithfully, impartially, and honestly, according to the best of ‘ my Skill and Ability, execute the Duty of making the Valua- ‘ tion hereby referred to me. *A. B.*

‘ Made and subscribed in the Presence of . ’

And if any Surveyor shall corruptly make such Declaration, or having made such Declaration shall wilfully act contrary thereto, he shall be guilty of a Misdemeanor.

Valuation, &c..
to be produced to
the Owner of the
Lands on demand.

61. The said Nomination and Declaration shall be annexed to the Valuation to be made by such Surveyor, and shall be preserved together therewith by the Promoters of the Undertaking, and they shall at all times produce the said Valuation and other Documents, on demand, to the Owner of the Lands comprised in such Valuation, and to all other Parties interested therein.

Expenses to be
borne by Promoters.

62. All the Expenses of and incident to every such Valuation shall be borne by the Promoters of the Undertaking.

Purchase Money
and Compensation,
how to be
estimated.

63. In estimating the Purchase Money or Compensation to be paid by the Promoters of the Undertaking in any of the Cases afore-said, regard shall be had by the Justices, Arbitrators, or Surveyors, as the case may be, not only to the Value of the Land to be purchased or taken by the Promoters of the Undertaking, but also to the Damage, if any, to be sustained by the Owner of the Lands by reason of the severing of the Lands taken from the other Lands of such Owner, or otherwise injuriously affecting such other Lands by the Exercise of the

Powers of this or the Special Act, or any Act incorporated therewith.

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Preliminary.—This section describes the basis for estimating the purchase-money or compensation where lands are taken, as distinguished from the cases in which lands are not taken, but are injuriously affected.

There are two main heads:—(1.) The value of the lands to be purchased or taken. (2.) The damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner which are not taken.

The persons who are to treat these rules as the basis for estimating purchase-money or compensation are justices, arbitrators, and surveyors; and by sect. 49 juries are also to do so.

Except for the omission of the word “other” in sect. 49 the latter part of both sections is identical; and it does not appear that the omission of the word “other” in any way alters the meaning of sect. 49.

The foregoing heads will be dealt with separately.

I. Basis of compensation.

(1.) General rules for assessing value of lands purchased or taken.

(a) Value to owner.

Illustrations.

(1) “The true principle and the only rule is that in the inquiry whether the interest of an occupier of a messuage or building is damaged, that is, injuriously affected, you should estimate the value of the messuage or building to the occupier with reference to the use that he makes of it, and the beneficial purpose for which he has hired and fitted it up, and for which he has paid and pays to the landlord a larger annual sum than the building *per se* would command; and if you find this use and enjoyment impaired by the works of the railway, you are bound to decide that the interest of the occupier is *pro tanto* damaged, that is, injuriously affected”: *per* Lord Westbury in *Ricket v. Metropolitan Ry.* (1867), L. R. 2 H. L. at p. 205.

(2) Notice to treat having been served by a railway company, a claimant sent in a claim for the land, for severance, and for deterioration of other land. The company deposited the amount of the valuation of the land only and entered. They were restrained from continuing in possession till they had made the proper deposit: *Field v. Carnarvon and Llanberis Ry.* (1867), L. R. 5 Eq. 190.

(3) A railway company were empowered by their Act, which incorporated the Lands Clauses Acts, to take certain lands and build a bridge across the Thames. Part of the land was a portion of the bed and foreshore of the river which belonged to the conservators whose consent in writing had to be (and was) obtained before the commencement of the work. The conservators as owners of the soil obtained compensation for the land, notwithstanding the consent which they had given: *Thames Conservators v. Victoria Station and Pimlico Ry.* (1869), L. R. 4 C. P. 59.

(4) “When Parliament gives compulsory powers and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it. The plaintiff, as rector, could never have parted with those churchyards, and therefore, to him, they were perfectly valueless. The Metropolitan Board, it is true, will be able to apply the land to purposes which will give it an increased value, but

that is no loss to the rector": *per* Cockburn, C.J., in *Stebbing v. Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37 at p. 42.

NOTE.—With respect to this case, see the judgment of Fry, J., in *Tiverton and North Devon Ry. v. Loosemore*, 51 L. J. Ch. at pp. 573—574; affirmed on other points in the House of Lords, 9 App. Cas. 480 (*see* p. 358, *post*).

(5) A railway company, in the exercise of their compulsory powers, gave notice to D. to treat for a plot of land, which they required for the purpose of ballasting their railway. The land contained an esker, or gravel hill. It was *held* (at *nisi prius*) that the arbitrator should consider the value of this in his estimate of the purchase-money to be paid for the land: *In re Midland Great Western Ry.* (1877), 11 Ir. L. T. 64.

(6) M. was an under-lessee under a covenant to repair for an unexpired term of fifty years. The P. Local Board gave notice to purchase part of his premises. It was *held* that, there being no negative covenant in the lease, M. was entitled to pull down and rebuild the premises; that M. was not entitled to rebuild in accordance with plans sanctioned by the board, which in fact contravened the local bye-laws, and that the compensation must be assessed on this basis: *In re McIntosh and Pontypridd Improvements Co.* (1891), 61 L. J. Q. B. 164.

(7) By a presentment of the grand jury at the Liverpool City Sessions, made under a local Act, it was declared that certain houses were unfit for human habitation, and in a state and condition prejudicial to health, and that they ought to be demolished. In the arbitration proceedings which followed to determine the amount of compensation to be paid to the owner of the houses by the corporation, the arbitrator made his award solely on the basis of the value of the site and the materials of the houses:—*Held*, that the houses ought to be estimated at their fair market value as they stood, taking into consideration their state of repair and their insanitary condition, but not the fact of the presentment of the grand jury: *Gough v. Liverpool Corporation* (1891), 65 L. T. 512.

(8) By a deed dated May 29th, 1839, the predecessor in title of the plaintiff granted to certain lessees, whose interest afterwards became vested in the defendants, certain lands for a railway for twenty-one years, at a yearly rent of 144*l.* 5*s.* The land in question afterwards became part of the defendants' system, and the rent was always duly paid after the expiration of the lease. On October 3rd, 1890, the defendants served upon the plaintiff a notice to treat, and an arbitration took place under the Lands Clauses Act. The umpire, in making his award, considered the yearly rent of 144*l.* 5*s.* as a basis upon which to calculate the value of the lands:—*Held*, that he was entitled to do so: *Eldon (Earl) v. North-Eastern Ry.* (1899), 80 L. T. 723.

(9) Lands of C. situate in Zanzibar were taken for a railway by the Secretary of State under the powers of the Indian Land Acquisition Act, 1894, s. 6. It was *held* that the measure of compensation was the market value at the date of the service of notice to treat, including such speculative advance therein as had already taken place in consequence of the railway scheme, but excluding any allowance for future speculative advance from that cause: *Secretary of State for Foreign Affairs v. Charlesworth*, [1901] A. C. 373.

(10) Lands which had been demised for twenty-one years at a rent of 43*l.*, with a clause of surrender at the end of seven or fourteen years, were taken by the Secretary of State for War:—*Held*, that the owner must be treated in reference to compensation as the matter stood at the moment before the service of the notice to treat; and that the basis of estimating the duration of the lease was to take the value of the whole unexpired term, deducting a proportion for the estimated chance of a prior determination; and that the reasonable value was what a purchaser would have given for it apart from the compulsory powers: *In re Athlone Rifle Range*, [1902] 1 I. R. 433.

(b) In the assessment of compensation no distinction is to be

made between undertakings for private gain and those which are for the public benefit (*see* sect. 18, *ante*).

- (c) Compensation must be assessed on the principle laid down in the Lands Clauses Act, but rights not taken away by the special Act must also be taken into consideration in assessing compensation.

Illustration.

Part of the foreshore of the river Thames was, by an Act of 1857, vested in the conservators of the river. A railway company, whose line ran along the foreshore, requiring a piece of it for a landing place, gave notice to treat, and the conservators gave notice to have the compensation determined by arbitration. The Act which authorised the company to take the land incorporated the Lands Clauses Act. The umpire stated at the outset of the arbitration the principle on which he considered the compensation ought to be assessed, viz., in accordance with the provisions of the Lands Clauses Act, but he eventually awarded the conservators over 2,000*l*. The company having failed to complete the purchase the conservators brought an action for specific performance of the statutory contract. The main defence was that the award was bad, because although the umpire had stated the right principle, the amount awarded showed (it was contended) that he had in fact departed from that principle, and acted on the wrong principle alleged to have been put forward by the witnesses for the plaintiffs, who, it was said, had calculated the amount of compensation as if it were to be arrived at, not under the Lands Clauses Act, but under sect. 58 of the Thames Conservancy Act, 1857, which provides that the consideration for any licence granted by the conservators under sect. 56 or 57 of the Act shall be such as in the judgment of some competent person appointed by the conservators and approved of by one of the Commissioners of Works shall be deemed to be the true and fair worth or value thereof to the person obtaining such licence:—*Held*, that the umpire was bound to assess the compensation on the principle laid down in the Lands Clauses Act, and that he had in fact done so, and had not assessed it on any such wrong principle as alleged, the largeness of the sum awarded being due, not to his having adopted any such erroneous principle as the defendants contended that he had adopted, but to his having borne in mind, as he was bound to do, that the company's Acts had not taken away or purported to take away without compensation any valuable rights the plaintiffs possessed in respect of this foreshore immediately before the passing of those Acts, and to his having considered, as he was bound to do, amongst those valuable rights, the rights the plaintiffs then had of granting licences under sect. 58 of their Act of 1857, and to his having borne in mind, as he was bound to do, in considering the value of such rights, that the company who already had their railway line by the margin of this foreshore, would probably or possibly want it for the purposes of their railway, and have to pay for it accordingly a sum fixed under that section: *Thames Conservators v. London, Tilbury and Southend Ry.* (1892), 68 L. T. 21.

NOTE.—A special Act provided that the defendants should, if so required by the trustees of the R. and W. estates, by means of a notice given within ten years from the passing of the Act, purchase those estates for such price as might be agreed upon or, failing agreement, as should be determined by arbitration under the Lands Clauses Acts. The trustees gave the notice as thus provided, and the matter of purchase-money and compensation was referred to J. W. as arbitrator, who awarded 40,000*l*. as the purchase-money, and 8,152*l*. as compensation for compulsory taking:—*Held*, that the taking was not a compulsory one, and that the arbitrator had no power to award anything in respect of compulsory sale: *Jerris v. Newcastle and Gateshead Water Co.* (1879), 13 T. L. R. 312.

- (d) Compensation is to be assessed for what the promoters intend to acquire as set forth in their notice to treat if that is not in excess of their powers.

Illustration.

A corporation, acting under a local Waterworks Act, which incorporated the Lands Clauses and Waterworks Clauses Acts, gave notice of their intention to take the whole of a certain stream. They, in fact, took and diverted only a portion. The defendants having demurred to a claim for compensation with regard to the taking and diversion of the whole stream :—*Held*, that the defendants, having, under their powers, given notice to purchase and divert the whole stream, they were bound to make compensation at once for the value of the entire stream to the plaintiffs as owners of the mill on the stream, and not merely to give them compensation from time to time proportioned to the degree in which the land might be injuriously affected : *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99.

- (e) A claimant's intention to use land in a particular way is to be considered.

Illustrations.

(1) W. was in possession of land under a renewable lease. The lease excepted all mines &c. An order had been made by the Court that the lease should be made into a fee farm grant, reserving the mines, &c., to the owner of the rent ; the grant had not, in fact, been executed. W. was in the habit of making bricks on part of the land. A railway company, in pursuance of their compulsory powers, gave W. notice to treat for a part of the land, where clay had never been dug, but under which the bed of clay extended. The reversioner knew that W. made the bricks, and made no claim to the clay. It was *held* that W. was only entitled to purchase-money of his interest on the basis of its being only used for agricultural purposes : *Wilson v. Carrickfergus and Larne Ry.* (1863), *Irish Reserved Cases*, 26.

(2) B. bought land for the purpose of building thereon a school. Before building was commenced the I. Railway Co. took, under their compulsory powers, part of the land, whereby the remainder was rendered less suitable for a school. No other land in the neighbourhood was equally suitable for that purpose :—*Held*, that the compensation should be based on the value to the particular claimant, and that B. was entitled to compensation for the injury to the land as the site of a school, although it was not built : *Bailey v. Isle of Thanet Light Rys.*, [1900] 1 Q. B. 722.

- (f) The special fitness or adaptability of the land for the purpose of the undertaking is a proper subject of consideration in estimating the amount of compensation.

Illustrations.

(1) An award was upheld by the Court where the arbitrator had taken into consideration the special value of land owing to its fitness for the purpose of a reservoir and waterworks : *Riddell v. Newcastle Water Co.* (1879), 90 L. T. 44, n.

(2) In the case of *In re Ossalinski (Countess) and Manchester Corporation* (1883) (Appendix, *post*), it was *held* that the arbitrator had rightly taken into consideration the enhanced value of the land on account of its adaptability for the purposes of a reservoir.

(3) The T. Corporation were empowered by their special Act to take certain land for the construction of a reservoir, which included land belonging to the Duke of N. The land was not of itself adaptable for a reservoir, but with other land belonging to other owners, which other land by itself was not so adaptable, was adaptable for a reservoir. In determining the value of the land of the Duke of N. the arbitrator had regard to its natural character and position, and to its proximity to the other parcels of land, and to the probability that if any other persons required all the lands for a reservoir, the land of the Duke of N. would have some enhanced value owing to its natural character and position and proximity to the other parcels of land :—*Held*, that the arbitrator was right in so holding : *In re Tynemouth Corporation and Northumberland (Duke)* (1903), 89 L. T. 557.

(4) In estimating the value of land to be acquired under statutory powers for the purpose of constructing a reservoir, the natural adaptability of the land for that purpose is a proper matter for consideration as an element of value ; to exclude such an element of value from being taken into consideration it must be shown on the facts that there is no reasonable possibility of a market for the land in question apart from the particular scheme under which it is taken : *In re Gough and Aspatria, Silloth and District Joint Water Board* (1904), 73 L. J. K. B. 228. “ It is alleged for the water board that, taking the facts as stated by the umpire, it follows as a matter of law that the element of value consisting in the peculiar adaptability of the site in question for the particular purpose of a reservoir ought not to be included. The umpire has included that as an element of value, and it seems to me that in doing so he has accepted the *primâ facie* presumption that that element of value existed and ought to be taken into consideration in settling the compensation to be paid for the land. That *primâ facie* presumption is based upon a long series of authorities. Underlying it is the assumption that there is a reasonable possibility of a market for the land. The whole question of value is in relation to a possible market. If anyone wants to assert that as a matter of law a particular element of value which *primâ facie* should be taken into account ought to be excluded, he must on the facts show that there is no reasonable possibility of any market for the land apart from the particular scheme ” : *per* Collins, M.R., at p. 230, *ib*.

(g) Compensation cannot be assessed in respect of matters for which either the Lands Clauses or Railways Clauses Act provides in another manner, such, *e.g.*, as accommodation works.

Illustrations.

(1) S., the owner of a mansion-house and lands, agreed with the promoters of a railway to refer to arbitration the value of the land to be taken and of residential and other damage, and “ all proper communications, archways, drains, &c., made in such places and in such mode as might be decided by the arbitrators,” and the reference was to be subject to the provisions of the Lands, Railways, and Companies Clauses Acts. At a later date the company gave notices in the usual forms prescribed by the Acts requiring S. to submit his claims, but S. disregarded the notices. The company then appointed their arbitrator, and S. appointed his. The arbitrators selected an umpire, who made his award, which, however, contained no reference to accommodation works. S. afterwards moved to set aside the award :—*Held* that, reference being made in the agreement to the Railways Clauses Act, the umpire was not bound to include in his award matters for which that Act specially provides : *Sherratt v. North Staffordshire Ry.* (1848), 5 Rail. Cas. 166.

(2) At a hearing before a sheriff and jury, the latter, after hearing evidence upon the claim, found in favour of the claimant—(1) a gross sum for the purchase of the lands; (2) a sum for severance ; and (3) a sum “ for severance owing to the crossing and the expense incurred thereby.” Evidence showed that this last would be the cost of a bridge :—*Held*, that the claimant was not entitled to the last-mentioned sum, for that was a

matter for the adjudication of the justices under sect. 69 of the Railways Clauses Act. The inquisition was, therefore, quashed : *South Wales Ry. v. Richards* (1849), 6 Rail. Cas. 197.

(3) Certain land belonging to W. being required by a canal company, it was agreed between the parties that the question of compensation for the property taken, and also for severance, should be referred to T. The referee duly made his award, but did not include therein any compensation in respect of the approaches, way or access to a certain close called the "Clay Field," of which W. was the lessee :—*Held*, that the referee, acting as he was under the Lands Clauses Act, had no power to determine the question of the future access to the land not taken, but could only award pecuniary compensation for the loss of the old approach : *Ware v. Regent's Canal* (1854), 7 Rail. Cas. 780.

(4) B. was the owner of between twenty and thirty acres of land, of which about one and a half acres were taken by a railway company, ten acres being severed by the railway and left without access. The land was agricultural, but it was well situated for building purposes, and a scheme for building land had been begun before the railway was projected. At the inquisition to assess compensation, the land was treated as being more or less valuable for building purposes, and the under-sheriff told the jury that, if they valued the land as building land, they must, for the purposes of the inquiry, treat the severed portion as having no access :—*Held*, that the jury, in assessing compensation, might take into account not only the present application of the land, but also its not too remote future prospective application, and should consider how far that prospective value would be depreciated by severance ; and should not have regard to the power of justices to order accommodation works, as these could only be ordered according to the present exigencies of the land, without regard to any prospective use thereof : *R. v. Brown* (1867), L. R. 2 Q. B. 630.

(2.) Special subjects of compensation.

(a) Prospective value.

Illustrations.

(1) By a special Act it was provided that if the undertakers of a navigation could not agree with any of the parties for the purchase of lands, a jury should be summoned to the quarter sessions, who should assess the purchase-money to be paid, and also what separate and distinct sums should be paid for damages before then sustained, or for the future temporary or perpetual continuance of any recurring damages which should have been occasioned by putting the Act in execution, the purchase-money and damages to be assessed separately ; and that the justices in sessions should give judgment for such purchase-money or recompense as should be assessed by a jury. The jury found a verdict of 6*l.* for value of land taken ; present damages, nothing ; future damages, 2,800*l.* Judgment was entered accordingly : *R. v. Yorkshire (West Riding) Justices* (1834), 1 A. & E. 563.

(2) Compensation was awarded for damage likely to be sustained in future from the water of the Clyde being penned back by the works of a railway company, and thereby damaging the land of the claimant : *Caledonian Ry. v. Lockhart* (1860), 3 Macq. H. L. 808.

(3) A railway company, being authorised to take certain lands belonging to R., gave him notice to treat and agreed with him to determine the amount of compensation due to him by arbitration. R.'s land consisted partly of land upon which he intended thereafter to build certain mills, and partly of a reservoir built by him in order to supply with water a part of the town of B. The umpire received evidence showing the prospective profits which might have been derived from supplying water to the mills when built, and

awarded compensation for the loss of those prospective profits:—*Held*, that the umpire was right in receiving the evidence and in awarding such compensation: *Ripley v. Great Northern Ry.* (1875), L. R. 10 Ch. 435.

(4) When lands are acquired under the Defence Acts, compensation may be given for depreciation in the value of other lands of the owner not taken, but *quære* whether compensation under the Defence Code is as comprehensive as that given under the Lands Clauses Acts? In estimating such compensation, regard may be had to loss of privacy and amenity, and the vulgarisation of the neighbourhood by, and other natural concomitants of, the establishment of a camp, but not to loss or injury from apprehended trespass by soldiers and others upon other lands of the same owner. Compensation may also be allowed for damage to a fishery arising from the proximity of an artillery range. *Semble*, even if it were an incorporeal hereditament: *per* Gibson, J., in *In re Ned's Point Battery*, [1903] 2 I. R. at pp. 197 *et seq.*

(5) The Secretary of State for War took certain land compulsorily under the Defence Acts for the purpose of erecting a fort:—*Held*, that the landowner was entitled to compensation, not only for the land actually taken, but also for the injurious affection of his adjoining land: *Blundell v. The King*, [1905] 1 K. B. 516.

- (b) Goodwill, injury to business by removal of premises, and the cost of reinstatement or acquisition of a new site are to be considered in assessing compensation.

Illustrations.

(1) “Another case, to which this is compared, *Chandler v. Gardiner*, bears little upon it. The Legislature destroyed beneficial interests [under the London Docks Act], which individuals had in the concerns and habits of their lives, giving them a compensation for interests of that substantial, though not very tangible, nature: something like goodwill. I conceived that the question was only, whether that was an interest, capable of disposition, and decided, with great reluctance, that, as it was an interest in the bankrupt, comprehended in the terms of the Bankrupt Acts, it was capable of being disposed of; and belonged to his assignees”: *per* Lord Eldon, C., in *Crutwell v. Lye* (1810), 17 Ves. at p. 343; 11 R. R. 98.

(2) On the construction of a very peculiar clause in the Hungerford Market Act a tenant from year to year who had received notice to quit obtained compensation for the marketable interest she had in the premises on the passing of the Act: *R. v. Hungerford Market, Ex parte Farlow* (1831), 2 B. & Ad. 341; 36 R. R. 580.

(3) The Act 11 Geo. IV. c. clxx. provided that all lessees or tenants for years or at will of any property to be purchased under the Act should give possession after three months' notice, and should receive compensation if required to quit before the expiration of their term, such compensation to be for any loss as to “goodwill, tenant's fixtures or otherwise.” S., whose term expired on the day the company came into possession (June 24th, 1830), obtained leave to hold on till the premises were wanted, and did so for a year and three quarters, at the end of which period he quitted, having received half a year's notice. His sub-tenant, who entered at Christmas, 1828, and had held from year to year, and who knew of the above proceedings and also received notice to quit, was *held* entitled to compensation for goodwill: *R. v. Hungerford Market, Ex parte Still* (1833), 4 B. & Ad. 592.

(4) Under the Hungerford Market Act a tenant obtained compensation for loss sustained in respect of goodwill or of a chance of renewal, but not for fixtures and other

improvements he had made, though these might be considered in estimating the value of the chance of renewal : *R. v. Hungerford Market, Ex parte Gosling* (1833), 4 B. & Ad. 596.

(5) Under the Hull Dock Company's Act compensation was awarded in respect of loss sustained by parting with premises on which a brewery was carried on until other premises could be found for carrying on the business : *Jubb v. Hull Dock* (1846), 9 Q. B. 443.

(6) Where houses and premises, used for purposes of trade, were injuriously affected by the works of a railway company :—*Held*, on construction of the special Act, that the owner was entitled to compensation for loss of trade in addition to compensation for the injury to the houses and premises : *In re McMullen* (1864), Irish Reserved Cases, 35 ; and see *post*, p. 306, III. (5).

(7) The M. Railway Co. gave notice to M. of their intention to take his premises under the powers in a special Act, sect. 13 of which provided that the company should give six months' notice of their intention to take any tenement. M. gave notice to the company of his intention to take other premises for his business, and did so. The company took no further step to obtain possession, and M. continued to pay rent for the old premises. M. brought an action for compensation for the expense of moving and for having to pay the rent of the old premises and for a *mandamus* to compel the company to proceed to obtain an assessment of the compensation due :—*Held*, that a *mandamus* would lie for the breach of the duty of the company to proceed under sect. 13 of the Lands Clauses Act to obtain possession and to take all steps necessary to enable M. to obtain compensation ; and that M. was entitled to recover such damages as he had actually sustained : *Morgan v. Metropolitan Ry.* (1868), L. R. 4 C. P. 97.

(8) A bootmaker carried on business at No. 11, Parliament Street. His lease being about to expire, he purchased the lease of No. 10 intending to transfer the business there ; but before the transfer the Commissioners of Works gave him notice to treat in respect of No. 10. Evidence of the profits made at No. 11 was admitted, and a sum awarded in respect of goodwill of No. 10, though the claimant's interest in No. 11 had not terminated : *White v. Public Works Commissioners* (1870), 22 L. T. 591. Kelly, C.B., said, at p. 593 : "The compensation as to his interest in the premises is not in question, but 100*l.* was awarded in respect of what is commonly called goodwill or loss of profits, which, we must take it, the arbitrator found would have attached to No. 10 [Parliament Street] on the transfer of the business to No. 10 from No. 11. I think it is only necessary to state the terms of the proposition clearly to see that it would be a grievous injustice if he were not entitled to this compensation" : *ib.*

(9) "It is as though a house in a street were taken, where a man carried on business, and there were other houses in the same street to be had, to which the business could be transferred with no loss of goodwill. In such a case no compensation for goodwill ought to be given. If the rent was greater, that ought to be compensated for ; if the lease was shorter, that ought ; and if other circumstances of loss or precariousness, they ought" : *per* Bramwell, L.J., in *Bidder v. North Staffordshire Ry.* (1878), 4 Q. B. D. at p. 432.

(10) Under an Irish Act compulsory powers of purchase were given which extended over land part of which was represented as insanitary. In assessing compensation to owners of land taken for a sanitation scheme compensation for loss of trade was awarded, and also compensation for compulsory purchase in respect of land not situated within the insanitary area : *Dublin Corporation v. Dowling* (1880), 6 L. R. Ir. 502.

(11) A railway company took land on which a leaseholder trained and exercised steeplechase horses and hunters. Compensation awarded included a large sum in respect of this business. The Court of Appeal expressed some doubt whether this part of the award could be supported, though the company's case failed on other grounds : *R. v. Sheward* (1880), 9 Q. B. D. 741.

(12) A tailor occupied a house which was taken by the Metropolitan Board of Works. He agreed with the Board to accept 400*l.*; 150*l.* of which was to be apportioned to his interest in the house and 250*l.* to a claim for trade damage. He was unable to make a good title, and brought an action for specific performance. The Board paid 400*l.* into court, executed a deed poll, and took possession. The 250*l.* was ordered to be paid to him at once, with interest from the day on which the Board took possession of the house: *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472. "It was said that the 250*l.* was to cover the goodwill, and that the mortgagee is entitled to that. But really 'goodwill' is a word of which few people understand the meaning. It is obvious that there are certain kinds of goodwill to which a mortgagee will be entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to that. If, for instance, there is a well-known public-house, and, from its position being well known, people frequent it, the goodwill attaches to the house and adds to its value. But there may be other kinds of goodwill attaching to personal reputation which a man has made for himself. Of course, that does not go to the mortgagee of the house, but is a thing personal to the man [*e.g.*, a tailor] whose skill and whose name have acquired that goodwill": *per* Cotton, L.J., at p. 479, *ib.*

(13) Tradesmen whose warehouse was taken under compulsory powers were working up their business, and had not as yet made it profitable. Their lease was at a rack-rent. The premises were suited to their business, and they had to pay 200*l.* a year more for premises that did not suit them so well. They recovered compensation for value of additional rent of new premises for a like term of years, and for cost of necessary alteration of the new premises, and for new fixtures, and for removal and damage to stock and extra cost necessarily entailed: *R. v. Burrow*, Appendix, *post*.

(14) S. & Co. conveyed business premises to the G. and S. W. Railway for 52,658*l.* The deed stated that this sum was made up of three different sums, one of which, amounting to 9,499*l.*, had been allowed by a jury as compensation for loss of business. This sum was held to be part of the "consideration for the sale" within the meaning of the Stamp Act, 1870, and liable to *ad valorem* duty accordingly: *Inland Revenue Commissioners v. Glasgow and South-Western Ry.* (1887), 12 App. Cas. 315. "Now, the language of the Legislature is this—that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account; and when such phrases as 'damages for loss of business' or 'compensation for the goodwill' taken from the person are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business; but in strictness the thing which is to be ascertained is the price to be paid for the land—that land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation": *per* Lord Halsbury, C., at p. 321, *ib.*

(15) Where a private Act provided that, in estimating compensation to be paid by the S. E. Railway Co. to the L. School Board, the arbitrator should assess the costs and expenses necessarily incurred in acquiring another site equally convenient, and the School Board acquired another site at a larger cost:—*Held*, that the Act "did not direct the arbitrator to assess the value of the thing acquired, but substituted for it the costs and expenses of acquiring the new site. The natural meaning of those words would include the cost of the new site": *London School Board v. South-Eastern Ry.* (1887), 3 T. L. R. 710.

(16) Where, on an application for a rule *nisi* for *certiorari* to bring up an inquisition to be quashed, on the grounds (1) of excessive jurisdiction, inasmuch as the high bailiff

withdrew from the jury one of the heads of claim ; (2) misdirection in telling the jury to disregard evidence that the claimants had actually spent a certain sum on the property, it appeared that the main point of the value of the land was submitted to the jury ; and that though the language of the high bailiff was loose, it did not amount to a direction to the jury to disregard the evidence in question. A rule *nisi* was refused, as the grievance alleged was not sufficient to quash the inquisition : *Streatham Estates Co. v. Public Works Commissioners* (1888), 52 J. P. 615.

(17) Where a church or public building or business premises are taken, or so seriously interfered with by a railway company that they can no longer be properly used for the purpose for which they were erected or occupied, the cost of reinstatement is, generally speaking, a fair mode of fixing the compensation due. In such cases the cost of reinstatement is given by taking the most suitable and convenient ground which can be obtained, without imposing any such extraordinary condition as that of purchasing adjacent ground, however great its value, and though already covered with expensive buildings : *Edinburgh Corporation v. North British Ry.* (1892) (*see Appendix*).

(18) A solicitor at Greenwich whose house and business premises had been taken by the London School Board was allowed to claim compensation for loss of business though he had obtained other premises in the same street ; but not for loss of access to the river, compensation for which was included in the sum allowed for loss of the house : *R. v. Scard* (1894), 10 T. L. R. 545.

(c) Trade fixtures and machinery.

Illustration.

A company who took a manufactory under compulsory powers were held bound to take the fixtures and machinery also as part of the manufactory, though the fixtures, being trade fixtures, were removable by the tenant : *Gibson v. Hammersmith and City Ry.* (1863), 32 L. J. Ch. 337.

(d) Leases and Tenancies.

The following rights are matters for compensation :—

(i.) Right to renew lease.

Illustration.

A right of renewal of a lease is a subject of compensation if the leasehold is taken under compulsory powers ; and none the less if the persons exercising those powers have acquired the reversion in fee : *Bogg v. Midland Ry.* (1867), L. R. 4 Eq. 310.

(ii.) Licence to assign lease.

Illustration.

A lease contained a proviso that the land should not be assigned without the lessor's licence. The necessity for the licence was held to be taken away by the operation of the Lands Clauses Acts : *Slipper v. Tottenham and Hampstead Junction Ry.* (1867), L. R. 4 Eq. 112.

(iii.) Improvements by tenant on faith of lease being valid.

Illustration.

C. was a lessee of property under two leases which turned out to be invalid as having been granted by the executors instead of by the heir at law of a last surviving trustee. The N. Railway Co. took the property, and compensation was awarded by a jury, viz., 1,500*l.* for the leases and 700*l.* for loss of trade :—*Held*, that C. was entitled to so much of the 1,500*l.* as represented the increase in value of the fee simple by reason of money laid out by him in improvements, which amount was to be ascertained in chambers, and also to the 700*l.* for loss of trade ; and that the remainder of the 1,500*l.* should be returned to the company : *In re North London Ry., Ex parte Cooper* (1865), 34 L. J. Ch. 373.

(iv.) Interest of executors and beneficiaries in lease.

Illustration.

A lease was bequeathed to executors, upon trust to permit the testator's sons to occupy the house demised by it as long as they carried on business therein, they paying a low rent to the executors and the executors paying the rent reserved by the lease. If the sons ceased to carry on the business the executors were to sell the house. To arrive at the value of the executors' interest a deduction was made from the value of the premises in respect of the low rent which would have been paid in the event of the sons continuing to occupy them ; the value of the sons' right of occupancy was arrived at by taking the present value of the improved rent subject to a deduction in view of the possibility that they might have ceased to carry on the business : *Penny v. Penny* (1868), L. R. 5 Eq. 227. But see *In re Morgan and The London and North-Western Ry.*, [1896] 2 Q. B. 469 ; see *post*, p. 299.

(v.) Agreement for lease.

Illustration.

An agreement for a lease was taken into account in estimating compensation even before the Judicature Act, 1873 : *Sweetman v. Metropolitan Ry.* (1864), 1 H. & M. 543.

(vi.) In cases where tenant holds over.

Illustration.

A yearly tenant who remained in possession after the expiration of six months' notice given by promoters was held entitled to compensation for the difference between his position as tenant at sufferance and the position of a tenant from year to year, the promoters having acquired the reversion and gone into possession more than a year after the date of the notice : *Cranwell v. London Corporation* (1870), L. R. 5 Ex. 284. " During the whole period, after the expiration of the six months, the plaintiff remained in possession, subject to a liability to be turned out at a moment's notice, provided payment were made by the corporation of the purchase-money due to him, if any, and he was entitled to compensation, at the least, for the difference between such a position, which was that of a mere tenant at sufferance, and the position of a tenant with a right to retain possession till a fixed and definite period " : *per* Willes, J., at p. 287, *ib.*

(vii.) Expense incurred by tenant in consequence of notice to treat.

Illustration.

A tenant from year to year received a notice from promoters requiring him to give up possession at the end of six months. Before the end of the six months he was informed by

the promoters that they did not intend to take possession. He was *held* entitled to compensation for expenses incurred in consequence of the first notice: *R. v. Rochdale Improvement Commissioners* (1856), 2 Jur. (N.S.) 861.

(viii.) Breach of covenants in leases.

Illustrations.

(1) Tenant from year to year of a house received six months' notice to quit from a railway company under their Act. The notice expired in the middle of a half-year, and the tenant gave up possession without requiring compensation. He was *held* liable for the half-year's rent: *Wainwright v. Ramsden* (1839), 5 M. & W. 602.

(2) Lessees who had received notice to treat from a railway company executed an assignment of the lease to the company, who took possession. The company also gave the lessor notice to treat, but the line was abandoned. In an action subsequently brought by the lessor against the lessees for breach of covenant to repair, it was *held* that the lessor could recover in respect of breaches committed after the notice to but before the assignment by the lessees; the measure of damages being the amount by which the reversion had deteriorated when the company took possession: *Mills v. East London Union* (1872), L. R. 8 C. P. 79.

(3) "But when you come to the question of the remedy for an infringement of the covenant, you must look at the Act of Parliament. There may be other covenants binding on the company for breach of which an action might well lie, because a breach of them could not be attributable to the execution of the works authorised by the statute. Suppose, *e.g.*, there were a covenant by the lessor to keep the place insured. A breach of that covenant could not arise from the construction of the works under the Act. An action would lie against a railway company for the breach of a covenant like that, but for any breach of covenant that is authorised by the Act of Parliament there is no remedy at all except under the compensation clauses": *per* Lindley, M.R., in *Manchester, Sheffield and Lincolnshire Ry. v. Anderson*, [1898] 2 Ch. at p. 401.

(ix.) Where land is leased at a low rent for a public park, a claimant entitled to re-enter is entitled to compensation on the basis of the commercial value of the land freed from the lease.

Illustration.

M. demised land to the S. Corporation for a public park, and stipulated that if the land or any part thereof should be taken by any company under statutory powers M. should be entitled to re-enter on and repossess his former estate. The L. Company took part of the land under a special Act:—*Held*, that M. was entitled to sell the land as free from the lease, and that the amount of compensation should be based on the commercial value of the land, and not on the capitalised value of the rental: *In re Morgan and London and North-Western Ry.*, [1896] 2 Q. B. 469.

(e) Risk of fire.

Illustration.

L. was the owner of a cotton mill and land. Part of the land was taken by a railway company. He obtained compensation by reason of the increased liability of the mill to risk of fire from the passage of the trains, which, of course, increased the insurance premium: *In re Stockport, Timperley and Altrincham Ry.* (1864), 33 L. J. Q. B. 251.

(f) Licensed houses.

(i.) Licensed property is to be valued as such.

Illustration.

A fully licensed public-house was let for a term of which twenty-six years were unexpired. Evidence was rightly admitted to show the present market value of the landlord's reversionary interest in the property as it then existed; and it was *held* to be wrong to estimate the rental value of the premises as a house and shop, apart from the question of whether they would be licensed premises at the end of the term. "It is clear that an element of value which would affect the price of the property in the open market may be taken into consideration": *per* Collins, J., *Belton v. London County Council*, [1893] 68 L. T. 411.

(ii.) A "tying covenant" in favour of the lessor is to be considered as increasing his compensation and as reducing that of the lessee.

Illustrations.

(1) Where a public-house was subject to a lease for seven years from the owners, who were brewers, and there was in the lease a covenant by the tenant not to sell any beer other than that bought of the owners:—*Held* that, in estimating the value of the premises to the owners, the additional value to them by reason of the covenant to sell their beer only was to be taken into consideration: *Bourne v. Liverpool Corporation* (1863), 33 L. J. Q. B. 15.

(2) Where the owner of a public-house is a brewer, who has leased the house subject to the ordinary "tying" covenant, the effect of this covenant upon the value of the house must be taken into consideration in valuing the interests of the owners and lessees: *London County Council v. City of London Brewery*, [1898] 1 Q. B. 387.

(3) C., a brewery company, had let a beerhouse with a covenant by the lessee binding him not to buy malt liquors from others than the lessors. The premises were taken by the L. County Council under the powers contained in the Housing of the Working Classes Act, 1890:—*Held*, that the existence of the covenant was an element to be considered in estimating the value of the property: *In re Chandler's Wiltshire Brewery and London County Council* (1903), 72 L. J. K. B. 250.

(g) Water rights.

(i.) Rights of water and the effect of the construction of embankments to increase the storage capacity of lakes or streams are the proper subjects of compensation.

Illustration.

The appellant granted to D. certain mills on a stream forming the outlet to two locks nearly surrounded by his property, with his "whole rights of water and water power connected with the said mills," reserving all his rights in the locks and streams except the rights therein connected with the mills. The storage capacity of the locks had been increased by embankments made within the appellant's ground. The respondents, who were waterworks commissioners under a special Act, acquired the rights of D. in the water, and, under their compulsory powers, took from the appellant a small piece of ground and

a wayleave for a pipe, which they inserted in a stream and diverted the waters of the locks to supply a town. Sect. 9 of the special Act provided that a certain quantity of water sent down the stream daily should be held to be sufficient compensation to the mill-owners and others. Sect. 10 reserved (*inter alia*) any rights the appellant had in lock H. In a claim for compensation the arbitrator found the appellant entitled—(1) to 50*l.* for the land and wayleave; and (2) “In the event of it being determined that the appellant had retained any right or interest in the waters of the locks and the streams or any of them, and that he is now entitled to compensation in respect of such right or interest, I find 3,000*l.* to be the amount to be paid” in respect of the right or interest to be acquired from the appellant “in the foresaid waters and the embankments” at the locks, “including in the said sum of 3,000*l.* the sum of 1,650*l.* as the estimated price or value of the embankments” :—*Held*, that the award was valid, inasmuch as the arbitrator had valued only one thing, the enhanced value of the water in the locks, and had not valued, as a separate subject, the embankments, but had properly included in the 3,000*l.*, as a factor of value, the incidental right obtained by the respondents to have the embankments left standing : *Blantyre (Lord) v. Babbie* (1888), 13 App. Cas. 631.

- (ii.) If a waterworks company take water and return part before the stream reaches the riparian proprietor claiming compensation, he can recover only damage for the part abstracted and not returned.

Illustration.

Messrs. P. were the owners of mills upon the river Ise. The K. Waterworks Co., under statutory powers, took a certain amount of water from two brooks which fell into another stream, which, in turn, joined the Ise. Fourteen-fifteenths of the water, after being used for drainage purposes at K., again fell into the Ise above the mills. It was stated that it must continue to do so unless the water were brought into another watershed, which would cost a great sum, or a different drainage system were adopted. The arbitrators found that if they were to deal with the question on the basis of the water originally taken, the damage was 825*l.*, but if it were treated on the footing of the actual present diminution of the stream, 55*l.* was enough :—*Held*, that Messrs. P., not being riparian owners on either of the brooks or the streams formed by their junction, could not proceed on the principle of purchase and claim the larger sum : *Page v. Kettering Waterworks* (1892), 8 T. L. R. 228.

- (h) Rights in churches, churchyards, and burial grounds.

Illustrations.

(1) The Metropolitan Board of Works were empowered to take compulsorily, upon making compensation, the whole of one and part of two other churchyards in the City of London, in which burials had been prohibited by Order in Council. The rector of the three parishes contended that for purposes of valuation the churchyards must be treated as if they were secular lands. But the land being valueless to him, he was *held* to be not entitled to compensation according to the value of which the land would be when acquired by the Board of Works. “The question is not what the persons who take the land will gain by taking it, but what the person from whom it is taken will lose by having it taken from him” : *per* Lush, J., in *Stebbing v. Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37; distinguishing *Hilcoat v. Archbishops of Canterbury and York* (1850), 10 C. B. 327, a case under a different Act.

(2) The Corporation of Liverpool had renounced all right to land formerly belonging to the parish which had been set apart as a burial ground, but was subsequently closed

against burials. Nevertheless, the corporation had to pay compensation on taking part of the land under the Liverpool Improvement Act, as there was no reverter of the fee to them on the closing of the ground for burials : *Campbell v. Liverpool Corporation* (1870), L. R. 9 Eq. 579.

(3) A railway company was authorised by special Act to acquire the site of a certain church, and afterwards obtained powers to construct the railway without taking and demolishing the church. The company afterwards gave notice of their intention to purchase some of the land and to make use of the whole of the buildings, and the question of compensation was referred to arbitration :—*Held*, that the basis upon which compensation ought to be assessed was that, although the lands taken were the site of a church at the time, they might at some future time cease, under some statutory provision, to be the site of a church and become available for building, and that the arbitrator might draw his own conclusion as to when that time, if ever, would come about : *In re City and South London Ry. and Rector of St. Mary Woolnoth*, [1903] 2 K. B. 728 ; affirmed in H. L. [1905] A. C. 1.

(k) Mesne profits.

Illustration.

Lands were taken by a railway company for the purposes of their railway. On June 27th, 1854, the owner brought ejectment to recover possession. On August 3rd the railway company executed a deed poll, under sect. 77 of the Lands Clauses Act, for the purpose of vesting the land in themselves. At the trial, on August 8th, a verdict was taken for the plaintiff, subject to a reference of the action and all matters in difference between the parties to an arbitrator, who was to ascertain what sums should be paid by the defendants to the plaintiff as the price of or compensation for his land, he thereby consenting to make and execute a conveyance, &c. The arbitrator made his award and directed that the verdict for the plaintiff should stand, and that a sum of money should be paid by the defendants to the plaintiff as the price of and compensation for the plaintiff's land taken by the company. The plaintiff, having signed judgment, sued out a writ of possession, under which he took possession, and afterwards brought an action for mesne profits :—*Held*, that the question of mesne profits was a matter in dispute between the parties which appeared by the award to have been disposed of by the arbitrator : *Smalley v. Blackburn Ry.* (1857), 2 H. & N. 158. “Mr. Kay has argued that the claim for mesne profits was at the time of the reference a future and contingent claim, which the arbitrator had no power to dispose of. The answer to that is that after the company had taken possession of the land, it was supposed that they were not entitled to it, and an action of ejectment was brought which, with all matters in difference, was referred. The reference was not merely as to the title, but was intended to put an end to all further litigation, and to give the plaintiff full compensation for every claim he could have. . . . The parties expressly contemplated the settlement of the question of mesne profits, and, the arbitrator having awarded in respect of them, the plaintiff must pursue his remedy under the award ” : *per* Pollock, C.B., at p. 163, *ib.*

(l) Insanitary area (Artizans and Labourers' Dwellings Act, 1875).

Illustration.

By a provisional order confirmation Act confirming a scheme under the Artizans and Labourers' Dwellings Act, 1875, two areas were affected. No. 1 was represented as unhealthy under sect. 3 of the Act of 1875 ; No. 2 was required to complete the scheme and for opening out the unhealthy area for the purposes of ventilation and health :—*Held*, that compensation might be awarded in both cases for loss of trade, and in the case of the

area not represented as unhealthy for compulsory purchase : *Dublin Corporation v. Dowling* (1880), 6 L. R. Ir. 502.

(m) Rise of price in coal (*see* p. 309, *ante*).

II. The elements of value to the owner which may not be taken into consideration are set out in the following illustrations:—

(1.) Tenant's chance of renewal of lease and claim for improvements.

Illustrations.

(1) A tenant who had executed improvements on the property on the assurance of his landlord that he would not be turned out when his lease expired, was *held* to have no interest for which promoters were bound to make compensation : *R. v. Liverpool and Manchester Ry.* (1836), 4 A. & E. 650 ; 43 R. R. 454.

(2) A tenant who had made improvements which he was bound to leave for his landlord's benefit was *held* not entitled to compensation for them, though the passing of the Act was the only reason for giving him notice to quit : *R. v. Hungerford Market, Ex parte Palmer* (1839), 9 A. & E. 463 ; 48 R. R. 563.

(3) In a statutory valuation under the Lands Clauses Act:—*Held*, that the tenant of licensed premises under a lease for a term of years was not entitled to have the chance of a renewal of the lease at its expiration taken into account in the valuation : *Lynch v. Glasgow Corporation* (1903), 5 Ct. of Sess. Cas. (5th series) 1174.

(2.) Yearly tenancies and holding over.

Illustrations.

(1) Tenants from year to year held over after the expiration of six months' notice from promoters under a special Act, which provided that such notice need not be given with reference to the commencement of the tenancy. They were *held* not entitled to compensation, as they remained in possession up to the time when the tenancy could have been determined by a landlord's notice : *R. v. London and Southampton Ry.* (1839), 10 A. & E. 3 ; 50 R. R. 306. This case was commented on in *Cranwell v. London Corporation* (1870), L. R. 5 Ex. 284, where it was pointed out that in *R. v. London and Southampton Ry.* it appeared that there had been some transaction by which the tenant had accepted an equivalent or satisfaction for the disturbance of his possession so as to disentitle him to claim damages by way of compensation.

(2) The Corporation of Manchester took, under compulsory powers, a house which was in the occupation of a yearly tenant. Notice to quit had been given to the tenant by the freeholder, but he did not give up possession, though he should have done so two days after the date of the agreement between the freeholder and the corporation. He was *held* not entitled to any part of the purchase-money : *Ex parte Nadin* (1848), 17 L. J. Ch. 421.

(3) A yearly tenant who receives notice to quit and whose land is not required until the expiration of the notice is not entitled to compensation : *Ex parte Merrett* (1860), 2 L. T. 471.

(4) Promoters served on the yearly tenant of a public-house six months' notice of their intention to enter. Nothing further was done for three years, and the tenant claimed compensation for the depreciation in value of the business by the demolition of the

neighbouring houses since the expiration of the six months. The claim failed, as it was his own fault that he continued to carry on the business after the notice had expired: *R. v. Vaughan* (1869), L. R. 4 Q. B. 190.

(3.) Quarterly tenancy.

Illustration.

Promoters, who had purchased a house, determined a quarterly tenancy by notice:—*Held*, that the tenant, at the expiration of the notice, had no interest in the premises for which he could claim compensation: *Syers v. Metropolitan Board of Works* (1877), 36 L. T. 277.

(4.) Fines on renewable leaseholds.

Illustration.

Notice was given by a company of an intention to take renewable leaseholds, and the lease was not renewed. The company broke up, and the land was taken by another company. It was *held* that compensation was not payable in respect of the fine which was lost in consequence of the non-renewal: *In re Westminster (Dean)*, *In re Hampstead Junction Ry.* (1858), 26 Beav. 214.

(5.) Restrictive covenants in leases.

Illustration.

A lessor covenanted with his lessee that neither he nor his assigns would build on a paddock which fronted the land demised. A railway company took the paddock under their compulsory powers and built a station on it. The lessee brought an action on the covenant against the lessor and failed, on the principle "*Lex non cogit ad impossibilia*": *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180.

NOTE.—It would seem that compensation could have been claimed against the company: see *Long Eaton Recreation Ground, Ltd. v. Midland Ry.*, *post*, p. 345.

(6.) Interest acquired after service of notice to treat.

Illustration.

The owner of a house, after service of a notice to treat, agreed with a tenant of parts of the house to grant him a lease of that part for three years. The tenant was *held* not entitled to compensation: *Ex parte Edwards*, *In re Marylebone (Stingo Lane) Improvement Act* (1871), L. R. 12 Eq. 389.

(7.) Determination of lease under an option, after claim for compensation.

Illustration.

A railway company, acting under statutory powers, began to erect buildings intended to be 100 feet high, and which, when complete, would deprive P., the lessee of a certain warehouse, of a considerable amount of daylight. P. accordingly served notice claiming compensation for loss of light. The warehouse in question was held on a lease for seventeen years from November 11th, 1883, determinable, however, at the end of three years by six months' notice. Owing to the progress of the company's buildings, P. exercised his option and removed to another place:—*Held*, that the act of the lessee (P.) in removing was not a necessary result of the company's acts, but a free exercise of

P.'s own will, and therefore he could not recover on the footing of being entitled to a fourteen years' lease; nor could he recover compensation for an injury which was merely prospective, as the statute gave no claim *quia timet* in respect of future injury: *R. v. Poulter* (1887), 20 Q. B. D. 132.

(8.) Right of pre-emption over other land.

Illustration.

The owner of land taken by a railway company had a right of pre-emption over adjoining land which the company also proposed to take. The owner claimed for compensation in respect of the right of pre-emption, but not for damages by severance. The claim failed, the right of pre-emption being a mere personal right: *Clout v. Metropolitan and District Rys.* (1883), 48 L. T. 257.

(9.) Nuisance.

Illustration.

Part of certain property in Glasgow was taken by a railway. The owner was held not entitled to compensation for damage to the rest of his property caused by noise, smoke, and the building of a railway bridge across the street. But a man may have a right of action where he cannot have statutory compensation: *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 H. L. Sc. 78.

(10.) Right to use room.

Illustration.

The right to use a room at particular times and the exclusive use of a desk for particular purposes do not constitute a tenancy so as to create a right to compensation: *Municipal Freehold Land Co. v. Metropolitan and District Rys.* (1883), 1 Cab. & E. 184.

(11.) Use of land for chapel, &c.

Illustration.

The M. Railway Co., under their compulsory powers, took land belonging to O. and let to W. a small plot at a rent of 10s. a year, on an agreement terminable by three months' notice, for the purpose of erecting a temporary chapel thereon. O.'s estate was being developed as a building estate for the erection of villas, and O. objected to the chapel as being prejudicial to the development of the estate, and claimed an injunction and a declaration that the agreement was *ultra vires* of the company:—*Held*, that the land was not being used for purposes inconsistent with those for which the company was formed, and even if it were shown that damage would be occasioned to the estate, O. was not entitled to an injunction: *Onslow v. Manchester, Sheffield and Lincolnshire Ry.* (1895), 64 L. J. Ch. 355.

(12.) Temporary obstruction to or deterioration of business owing to the removal of neighbouring houses or diversion of traffic.

Illustrations.

(1) The plaintiff, a bookseller having a shop fronting a public thoroughfare, suffered loss in his business through the diversion of the highway by the defendants continuing an authorised obstruction of it for an unreasonable length of time:—*Held*, that the plaintiff

had shown sufficient damage to maintain an action : *Wilkes v. Hungerford Market* (1835), 2 Bing. (N.C.) 281.

(2) A dock company was empowered to take property for the purpose of making a new entrance to their dock, and a jury was, if necessary, to assess the compensation due for property taken, goodwill, improvements, or other interest ; and it was enacted that if any person having an interest not less than that of tenant from year to year should suffer damage by the making of any cut, sluice, bridge, road, or other work, compensation should be paid therefor. The company pulled down several houses and made a cut which intercepted certain thoroughfares, and compelled those who had used them to take circuitous routes. The tenants of a neighbouring public-house claimed compensation for injury arising from a reduction in the number of customers, and also as the occupiers of the house were cut off from thoroughfares to the house, formerly used, and thereby the value of the premises as a public-house or shop was lessened :—*Held*, that the claimants were not entitled to compensation : *R. v. London Dock* (1836), 5 A. & E. 163 ; 44 R. R. 387.

(3) A railway company, acting under statutory powers, took for the purposes of the railway a piece of land forming part of a highway leading from London to Wandsworth. The railway was constructed upon and across the highway, thereby creating permanent difficulty of access to certain tenements and buildings of the plaintiff, which were used as shops :—*Held*, that the property was injuriously affected, and the plaintiff was therefore entitled to compensation : *Chamberlain v. West End and Crystal Palace Ry.* (1862), 8 Jur. (N.S.) 935.

(4) R. was the occupier of a public-house situate near a public footway. A railway company, acting under and within their statutory powers, caused for a time an obstruction to certain streets leading to the footway, thereby rendering the access to the public-house less convenient. The jury found that there was no structural damage to the premises, but that R. had sustained damage through interruption caused to his business :—*Held* (Lord Westbury *dis.*), that R. was not entitled under sect. 68 of the Lands Clauses Act, nor under sect. 6 or sect. 16 of the Railways Clauses Act to compensation for injury to his trade : *Ricket v. Metropolitan Ry.* (1867), L. R. 2 H. L. 175.

(5) The M. Railway Co. in June, 1865, served notice to treat on F., who was a tenant from year to year of a public-house, and also a notice, under their powers, of their intention to take the premises at the end of six months. Nothing further was done until 1868, when the company took the premises, and the compensation was assessed. F. claimed (*inter alia*) compensation for loss of trade in the interval between the expiration of the six months' notice and 1868, occasioned by the pulling down of neighbouring houses by the company under their statutory powers :—*Held*, that the claim must be rejected, as F. could not claim the value of his interest at the date of the notice and also subsequent loss of profits : *R. v. Vaughan* (1868), L. R. 4 Q. B. 190. "It is very desirable to adhere strictly to the rule that that only is subject to compensation under these statutes which would have been the subject of an action if the company had acted without statutory powers. Now, it is clear that no action would lie by persons whose business is deteriorated by reason of someone having purchased and pulled down the neighbouring houses" : *per* Hannen, J., at p. 195, *ib.* ; and see *ante*, p. 295, Illustration (6).

(6) A special Act excluded the provisions of the Lands Clauses Act as to the purchase and taking of lands otherwise than by agreement. An owner failed to obtain from the promoters compensation for injury to trade resulting from diversion of traffic : *Bigg v. London Corporation* (1873), L. R. 15 Eq. 376.

(7) A shopkeeper sued a local authority for damages caused by loss of business at his shop through the road which gave access to the shop being unnecessarily and negligently obstructed by them. Under an Act of Parliament the defendants were empowered to

obstruct the road temporarily while making a new street :—*Held* that, there being no evidence of any damage to the plaintiff arising out of any excess by the defendants of their statutory powers, the defendants were entitled to judgment. Whether, assuming a loss of business through such an excess, the injury to the defendant would have been actionable, *quære* : *Martin v. London County Council* (1899), 80 L. T. 866.

(13.) Works done by a landowner before the special Act is obtained in the nature of a speculation dependent upon the promoters obtaining their Act, and acts done or omitted to be done under a collateral obligation entered into by the company.

Illustrations.

(1) A railway company, being desirous of making an extension line, entered into an agreement with a financial company to begin the railway works forthwith. Part of the line was intended to be constructed over lands belonging to F., and F., acting in co-operation with the railway company, began the construction of an embankment across his land. The company's Bill passed in the following year, and contained a proviso that if the new line was not opened for traffic within five years the Parliamentary deposit should be applied towards compensating landowners or others whose land had been affected or rendered less valuable "by the commencement, construction or abandonment of the railway." The extension railway was not completed within five years, but no warrant of abandonment was obtained under the Railways Abandonment Acts. A fresh Act was passed authorising a petition for winding up the company and for the sale of the undertaking by the official liquidator. A petition having been presented by F.'s mortgagees and the trustee in F.'s liquidation for the application of the Parliamentary deposit in paying compensation for the injury done by the commencement, construction or abandonment of the works :—*Held*, that in order to entitle a person to compensation out of the Parliamentary deposit his property must have been rendered less valuable either by the commencement of the railway, or by its construction, or by its abandonment, and the comparison of value in the case of commencement must be with that on the date of the passing of the special Act, and in the case of abandonment, between the value immediately before and after the abandonment; *held also* that the railway had been "abandoned" within the meaning of the Act; that as F. had made the embankment on the speculation that the company's Act would pass, he had not been injured by the "commencement" of the railway, but that he had been injured by the "abandonment" : *In re Potteries, Shrewsbury and North Wales Ry.* (1883), 25 Ch. D. 251.

(2) A special railway Act provided that, in case of the abandonment of the railway, the Parliamentary deposit should be applicable towards compensating any owner or other person whose property had been interfered with or rendered less valuable by the operations of the railway company. A claim was put in by H.'s trustees, the principal heads of damage alleged being the failure of the company to put up proper fences on the land, and their failure to build a station as agreed. They also relied on the loss of access to the estate through the abandonment of the line. The land taken had been offered to the trustees, who were willing to repurchase it, but the terms were not fixed :—*Held* that, in such circumstances, compensation could be claimed only as to acts done or omitted to be done by the company under their statutory powers, and not on account of any collateral obligation; but *held* that, where a company has entered into a collateral obligation of such a nature that the breach of the obligation is of necessity involved in the abandonment of the railway and undistinguishable from it, such as a covenant to build a station, the breach of such an obligation may be taken into account in assessing the diminution in the value of the land : *In re Ruthin and Cerrig-y-Druidion Ry.* (1886), 32 Ch. D. 438.

(14.) Arrears and apportionment of rent.

Illustrations.

(1) Where a portion of lands held under leases is compulsorily taken by a railway company under the Railways (Ireland) Act, 1860, and the rent is apportioned by the arbitrator, the apportioned rent only is payable to the landlord from the date of the final award, although no conveyance is executed to the company, nor premises taken by them, until after the accrual of subsequent amounts of rent: *Ball v. Graves* (1886), 18 L. R. Ir. 224; see, however, *Callow v. Flynn, infra*.

(2) Lands held by F. as tenant of C. under a lease were taken by a public authority under a local Act which incorporated the Railways (Ireland) Act, 1851, and the arbitrator made his award (*inter alia*), awarding that the rent should be wholly abated, but the compensation-money payable thereunder was not lodged in court until many months after the date of the award:—*Held*, that C., the lessor, was entitled to recover rent under the lease from F. for the period between the date of the award and that of the payment into court of the compensation awarded to C., pursuant to the Railways (Ireland) Act, 1851: *Callow v. Flynn* (1890), 26 L. R. Ir. 179.

(3) Arbitrators appointed under the Lands Clauses Act for the purpose of assessing compensation to be paid for lands taken under statutory powers *held* not to be entitled, in assessing the value of the owner's or reversioner's interest, to take into account the existence of arrears of rent due by lessees or tenants, which that taking rendered irrecoverable; nor entitled to award to the owner, as part of the costs of the arbitration, costs of a prior abortive arbitration purporting to be held under the Railways (Ireland) Acts: *In re Kilworth Rifle Range*, [1899] 2 I. R. 305.

(4) The time for which the apportioned rent is payable runs from the date when the apportionment is made, whether by agreement between the parties or by the order of two justices: *In re Secretary of State for War and Hurley's Contract*, [1904] 1 Ir. R. 354. In this case *Ball v. Graves (supra)* was followed.

(15.) Improved value of copyholds.

Illustration.

A railway was made through lands holden of a manor, and cottages and works were erected thereon. A conveyance by the copyholder was enrolled. Several years afterwards the lord gave notice to enfranchise. He was *held* not entitled to have compensation assessed on the value of the land as improved by the company's works. But his right under the custom of the manor to fines calculated on the improved annual value was not affected by the delay: *Lowther v. Caledonian Ry.*, [1892] 1 Ch. 73.

(16.) Cases in which compensation can be obtained under sect. 68.

Illustration.

"It seems to us that the arbitrator could not, with propriety, have included any compensation in respect of that piece of land in his award. If any injury should hereafter arise, Mr. Ware would be entitled to compensation under the 68th section, which is expressly provided to meet such a case as this": *per* Pollock, C.B., in *Ware v. Regent's Canal* (1854), 23 L. J. Ex. 145 at p. 147; see p. 293, *ante*.

(17.) Rise in price of coal since date of notice of treat.

Illustration.

Compensation was payable to coalowners in respect of seams of coal under and near a reservoir of a waterworks company which prevented the working of the coal. Coal rose in value subsequently to the date of the company's notice to treat and before the making of the arbitrator's award. It was *held*, that the coalowners were entitled to have compensation assessed on the basis of the knowledge of the value of the coal which was acquired subsequently to the date of the notice : *Bwlfa and Merthyr Dare Steam Collieries v. Pontypridd Waterworks*, [1903] A. C. 426 ; and see *In re Richard and Great Western Ry.*, [1905] 1 K. B. 68.

III. The damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner which are not taken.

NOTE.—The severance may be either lateral or vertical, as in the case of taking land without the subjacent minerals : *Errington v. Metropolitan District Ry.* (1882), 19 Ch. D. 559 ; see *ante*, p. 144.

(1.) The damage is the reduced present or prospective value of the lands not taken by reason of the severance lawfully made within the statutory powers of the promoters.

Illustrations.

(1) Agricultural land at W. was favourably situated for building, and a building scheme had actually been on foot. Part of it was taken by a railway company, and the severed portion being rendered useless for building because all access was cut off, the depreciation was rightly considered in assessing the amount of compensation : *R. v. Brown* (1867), 8 B. & S. 456.

(2) The Duke of B. held under a Crown lease Montagu House, the garden of which ran down to the Thames. When the Thames Embankment was made he obtained—(1) compensation for damage sustained by loss of the river frontage : (2) compensation for depreciation of the property by the interposition of a public highway between the house and the river : *Buccleuch (Duke) v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418. “In neither of these cases [*Hammersmith and City Ry. v. Brand* (1869), L. R. 4 H. L. 171 ; and *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 H. L. Sc. 78] was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction, of the railway. But if in each of those cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made, on account of their probable depreciation by reason of vibration or smoke, or noise occasioned by passing trains. . . . Now, if he was of opinion that Montagu House was depreciated in value as a residence, by reason of the proximity of the embankment, and of all the consequences of its use as a public highway, he was bound to give the plaintiff some compensation, and the amount proper to be awarded was entirely for him to determine” : *per* Lord Chelmsford, at pp. 458, 460, *ib.*

(3) A gas company took some meadows leased to a volunteer corps and lying behind their rifle butts. Between the butts and the meadows was marsh land, as to which the

corps had a verbal agreement for payment of a fixed annual sum as compensation for any injury done to cattle on the land. The corps obtained compensation for severance, although they had only a revocable licence to shoot over the marsh land, that being a point that only went to the *quantum* of damages : *Holt v. Gas Light and Coke* (1872), L. R. 7 Q. B. 728.

(4) Land, part of which was taken by a railway company, was subject to a thirty years' lease, determinable by the lessor on three months' notice. This notice was given as to the land taken by the company after a notice to treat, but before the company took possession. The lessee claimed for damage done to the remainder of the land by severance; but was only *held* entitled to damage for severance for the period of the rest of the three months : *R. v. Kennedy*, [1893] 1 Q. B. 553 ; *Berley Heath Ry. v. North*, [1894] 2 Q. B. 579.

(5) P. was the lessee of land. The L. School Board served upon him a notice to acquire part of it for the site of a school. On another part P. had already built some houses, and, when the value of the land came to be assessed, gave evidence of the depreciation of these houses owing to the noise made by the children at the school. The jury assessed the damages at 1,000*l.* :—*Held*, that the jury were entitled to assess the damages under this head, and the Court therefore declined to disturb the verdict, and refused a *certiorari* to bring up the inquisition to be quashed : *R. v. Pearce, Ex parte London School Board* (1898), 78 L. T. 681.

(2.) The damage done must be capable of being foreseen, and must not be too remote.

Illustrations.

(1) A clause in a special Act provided for the assessment of compensation, "for the future, temporary or perpetual continuance of any recurring damages." A jury assessed a sum in respect of future damages at a time when no damage existed. It was *held* that they were precluded from considering the question of future damages until they had ascertained the existence of present damages : *Lee v. Milner* (1837), 2 M. & W. 824.

(2) A railway company by erecting a bridge interfered with the flow of water into a mill-dam. The lessee of the mill-dam moved for an injunction restraining the company from proceeding with their works before ascertaining the compensation payable for the diminution of water. It was *held* that, as the works were on the company's own land, they were not obliged to pay compensation before the completion of the works : *Hutton v. London and South-Western Ry.* (1849), 7 Hare, 259.

(3) Owing to the construction of a railway, which was carried along an embankment, the flood waters of an adjacent river were unable to spread themselves over the low lands alongside the river, as formerly, and flowed over a bank, which formerly protected the plaintiff's land, on to that land. Before the railway was constructed, and before the plaintiff became possessed of the land overflowed by the flood waters, the owner of this and of adjacent land, from whom the plaintiff derived title, agreed with the railway company to refer to arbitration the sum to be paid by the company for the purchase of part of such adjacent land and as compensation for all injury and damage to his remaining estate "by severance or otherwise" :—*Held*, that the compensation awarded under this agreement related only to such damage, known or contingent, by reason of the construction of the railway at other places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded ; that it did not embrace contingent and possible damages which might arise afterwards by the works of the company at other places, and which could not be foreseen by the arbitrator ; and that compensation for the damage arising to the plaintiff in the present circumstances was not included in the compensation awarded : *Lawrence v. Great Northern Ry.* (1851), 16 Q. B. 643.

(4) Compensation was awarded to a landowner in 1845 "in respect of the damage which might be sustained" by the making of a railway. In 1847 the railway carried out further works, and the landowner claimed further compensation. The Court refused to restrain him from taking proceedings under the Lands Clauses Act for the purpose of enforcing his claim : *Lancashire and Yorkshire Ry. v. Evans* (1851), 15 Beav. 322.

(5) B., the occupier of ironworks, had the right to use two tramways. The L. Railway Co. by their Act obtained power to abandon these tramways at their option. The company gave B. notice to treat for certain lands of his, and the question of compensation was referred to arbitration. B. claimed compensation for damage which would result from the future exercise by the company of their option to close the tramways. The umpire awarded B. compensation for "damage sustained and which might be sustained by him by reason of the execution of the works of the railway or by the exercise by the company of the powers of their Act"—*Held*, that the award did not show on the face of it that the compensation had been awarded for contingent damages; and *semble*, that even if it had, the award was not therefore bad : *Brogden v. Llynvi Valley Ry.* (1860), 30 L. J. C. P. 61. The Court said: "We do not intend to sanction the argument that the award would have been bad if the umpire had given the compensation for contingent damage which the company alleged."

(6) A railway company were authorised to construct a tunnel under land on which stood a manufactory and buildings; compensation was awarded and paid, and the site of the tunnel, with the right to construct, maintain and use it, was conveyed to the company "freed and discharged from all claims and demands whatsoever" on the part of the owner of the land. The tunnel was opened for traffic in 1849. In 1859 the buildings on the land were in a ruinous condition in consequence of subsidences and of the vibration caused by the traffic through the tunnel. It was *held* that the owner had no right of action against the company, and no further claim for compensation under the Lands Clauses Act : *Croft v. London and North-Western Ry.* (1863), 3 B. & S. 436. "Here, the amount of compensation having been ascertained by arbitrators, it is proposed to re-open the question, and to give to the plaintiff, either by fresh arbitration or by action, damages which might have been assessed under the first inquiry. That cannot be done": *per* Cockburn, C.J., at p. 454, *ib.*

(7) In an award under the Lands Clauses Act the plaintiff was a seedsman, having offices in Covent Garden, where he kept his stock, and having also a market-garden at W., where he sowed small quantities of all the seeds in his stock on trial, after which he sold each parcel at a higher price by reason of his giving a warranty, based on his experience of these trial crops. The defendants entered upon his land, and so carried on their works that it became impossible to identify the trial crops with the seed in bulk, whereby the plaintiff was unable to warrant his seeds, which in consequence lost 50 per cent. in value. The arbitrator having included in his award a sum in respect of such depreciation :—*Held* (although with some hesitation), that this damage was too remote, and could not be recovered : *In re Clarke and Wandsworth District Board of Works* (1868), 17 L. T. 549.

(8) A railway company made the deposit and gave the bond required by sect. 85 of the Lands Clauses Consolidation Act, 1845. An arbitrator subsequently found the landowners entitled to certain sums as compensation, of which one was for minerals. The company was *held* entitled to the return of their deposit on payment of the sums awarded other than that awarded in respect of the minerals, which were not required by them and were not included in their deed poll : *Ex parte Neath and Brecon Ry.* (1876), 2 Ch. D. 201.

(9) Compensation was made by lessees of coal under M.'s land for subsidence and injury caused. They worked no more, but afterwards a further subsidence took place causing further injury :—*Held*, that M. was entitled to further compensation for this injury, which could not be foreseen : *Darley Main Colliery v. Mitchell* (1886), 11 App. Cas. 127 : followed in *Crumbie v. Wallsend Local Board*, [1891] 1 Q. B. 503; considered in *Hall v. Norfolk (Duke)*, [1900] 2 Ch. 493, where Kekewich, J., held that the owner of minerals is not liable

for damage caused to neighbouring land by subsidence occasioned by the working of the minerals by his predecessor in title, although the damage did not actually occur until after the owner came into possession. There was nothing in such a case in the nature of a continuing nuisance.

(10) Land taken for sewage works formed part of an estate laid out for building, and was let on long building leases. Other land alleged to be injuriously affected was, as to part, in hand, and as to another part let for short terms of years for brickmaking, with power to resume possession as each acre of brick earth was worked out. Part was separated from the land taken by other land, and the whole of the remainder was separated by a railway line. The claimant recovered the value of the land taken, and a further sum for damage sustained or to be sustained by reason of the other lands being injuriously affected by the use, as well as by the construction, of the sewage works: *Couper v. Esser* v. *Acton Local Board* (1889), 14 App. Cas. 153.

(11) Compensation may be given in respect of minerals though they are not immediately workable. "It would be wrong . . . to impose upon a person whose land has been taken from him against his will the burden of proving by costly experiments the mineral contents of his land as a condition precedent to obtaining compensation": *per* Lord Macnaghten in *Brown v. Commissioner for Railways* (1890), 15 App. Cas. 240 at p. 249.

(12) A reservoir was made in lands which contained coal. A prudent lessee working without right to compensation would have been compelled by apprehension of injury from the reservoir to abstain from working more than 50 per cent. of the coal near the reservoir. The mineowners were held not entitled to compensation for such prospective prevention of the working. This, of course, would not interfere with their right to recover damages from the owners of the reservoir, if, when the coal near it was actually worked, damage ensued to the mine: *Holliday v. Wakefield Corporation*, [1891] A. C. 81; followed in next case.

(13) A railway company for the purposes of their undertaking took land and the subjacent minerals with the exception of the coal. The landowner failed to obtain compensation for the coal; as if the company failed to pay compensation when the time came for working it, he would have a right to work it, even though by working it he would damage the railway: *In re Gerard (Lord) and London and North-Western Ry.*, [1895] 1 Q. B. 459.

(14) An Act empowering the construction of a canal by sect. 39 reserved to the owners of lands in, upon, or through which the canal was to be made the mines and minerals within or under the lands to be set out or made use of for the canal, and authorised the owners to work the mines and minerals, not thereby injuring the canal. By sect. 40, if the working of the mines should cause danger of injury, either to the canal or to the mines, the company might treat with the owner as to the minerals to be left for the benefit of the canal, and, in case of disagreement, compensation might be assessed by a jury. The C. Company owned mines adjacent to but not under the canal. The working of the mines near the canal would not endanger or damage the mines, but would cause damage to the canal. The C. Company gave the canal company notice to treat for the purchase of all such coal and minerals near or under the canal as should be proper to be left for the security and preservation thereof. The canal company declined to treat for the purchase. The C. Company brought an action for a declaration that they were entitled to have the compensation assessed:—*Held*, that sect. 39 did not apply to adjacent mineowners whose mines were not subjacent to the canal; and that under sect. 40 the mineowner could only cease working and claim compensation in case the future working of the mines were endangered or damaged: *Chamber Colliery v. Rochdale Canal*, [1895] A. C. 564.

(15) Owing to the construction under statutory powers of a reservoir and the consequent influx of workmen who would reside in the neighbourhood for a considerable period, it was reasonably certain that there would be an additional population of children who would require education. The Duke of N. was the owner of fourteen-fifteenths of the land in the township where the land taken for the construction of the reservoir was situated:—*Held*,

that no claim was maintainable in respect of expense which might be incurred for educating these children, as it was merely an uncertain and remote possibility of a burden being imposed in respect of something which was not the use of the land itself : *In re Tyne-mouth Corporation and Northumberland (Duke)* (1903), 89 L. T. 557.

(3.) Damage to mines and minerals (*see* under the Railways Clauses Consolidation Act, 1845, *post*).

Where Compensation to absent Party has been determined by a Surveyor, the Party may have the same submitted to Arbitration.

64. When the Compensation payable in respect of any Lands, or any Interest therein, shall have been ascertained by the Valuation of a Surveyor, and deposited in the Bank under the Provisions herein contained, by reason that the Owner of or Party entitled to convey such Lands or such Interest therein as aforesaid could not be found or was absent from the Kingdom, if such Owner or Party shall be dissatisfied with such Valuation it shall be lawful for him, before he shall have applied to the Court of Chancery for Payment or Investment of the Monies so deposited under the Provisions herein contained by Notice in Writing to the Promoters of the Undertaking, to require the Question of such Compensation to be submitted to Arbitration, and thereupon the same shall be so submitted accordingly in the same Manner as in other Cases of disputed Compensation herein-before authorized or required to be submitted to Arbitration.

This section gives the right of re-opening the question of compensation in the case of the absence of the claimant from the kingdom, or where he cannot be found. It does not apply to the case of a claimant who fails to appear at the time appointed for an inquiry after due notice thereof: as to which, *see* sect. 58. The question must be raised before any application is made to the Court as to the fund deposited.

Sects. 69—80 contain the provisions of the Act as to the deposit of compensation in the bank (*see* especially sects. 76—78).

As to arbitrations, reference may be made to sects. 23, 25—37 of this Act and to the Arbitration Act, 1889.

65. The Question to be submitted to the Arbitrators in the Case last aforesaid shall be, whether the said Sum so deposited as aforesaid by the Promoters of the Undertaking was a sufficient Sum, or

Question to be submitted to the Arbitrators.

whether any and what further Sum ought to be paid or deposited by them.

Under this section the question which is to be submitted to the arbitrators in cases arising under sect. 64 is the sufficiency of the amount deposited for compensation.

If further Sum
be awarded,
Promoters to pay
or deposit same
within 14 Days.

66. If the Arbitrators shall award that a further Sum ought to be paid or deposited by the Promoters of the Undertaking, they shall pay or deposit, as the Case may require, such further Sum within Fourteen Days after the making of such Award, or in default thereof the same may be enforced by Attachment, or recovered with Costs by Action or Suit in any of the Superior Courts.

This section provides for the recovery by the claimant of such further sum (if any) as may be awarded for compensation by the arbitrator under sects. 64 and 65.

Such recovery may be by attachment or (which is the more usual course) by action.

As to deposit in the bank, *see* sect. 69.

Costs of the
Arbitration.

67. If the Arbitrators shall determine that the Sum so deposited was sufficient, the Costs of and incident to such Arbitration, to be determined by the Arbitrators, shall be in the Discretion of the Arbitrators, but if the Arbitrators shall determine that a further Sum ought to be paid or deposited by the Promoters of the Undertaking, all the Costs of and incident to the Arbitration shall be borne by the Promoters of the Undertaking.

This section deals with the costs of arbitrations under sect. 64.

Such costs are payable by the promoters if a further sum is awarded to the claimant: if no further sum is awarded, the costs are in the discretion of the arbitrators. In the latter respect the provisions of the section differ from those of sect. 34.

If taxation is required by either claimant or promoters, the costs must be taxed by a master of the Supreme Court under sect. 1 of the

Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11); which Act has replaced sect. 1 of the Lands Clauses Consolidation Act, 1869, and sect. 45 of the Regulation of Railways Act, 1868 (*see post*).

To be settled by
Arbitration or
Jury, at the Option
of the Party
claiming
Compensation.

68. If any Party shall be entitled to any Compensation in respect of any Lands, or of any Interest therein, which shall have been taken for or injuriously affected by the Execution of the Works, and for which the Promoters of the Undertaking shall not have made Satisfaction under the Provisions of this or the Special Act, or any Act incorporated therewith, and if the Compensation claimed in such Case shall exceed the Sum of Fifty Pounds, such Party may have the same settled either by Arbitration or by the Verdict of a Jury, as he shall think fit; and if such Party desire to have the same settled by arbitration, it shall be lawful for him to give notice in Writing to the Promoters of the Undertaking of such his Desire, stating in such Notice the Nature of the Interest in such Lands in respect of which he claims Compensation, and the Amount of the Compensation so claimed therein; and unless the Promoters of the Undertaking be willing to pay the Amount of Compensation so claimed, and shall enter into a written Agreement for that purpose within Twenty-One Days after the Receipt of any such Notice from any Party so entitled, the same shall be settled by Arbitration in the manner herein provided; or if the Party so entitled as aforesaid desire to have such Question of Compensation settled by Jury, it shall be lawful for him to give notice in Writing of such his Desire to the Promoters of the Undertaking, stating such Particulars as aforesaid, and unless the Promoters of the Undertaking be willing to pay the amount of Compensation so claimed, and enter into a written Agreement for that Purpose, they shall, within Twenty-one Days after the Receipt of such Notice, issue their warrant to the Sheriff to summon a Jury for settling the same in the Manner herein provided, and in default thereof they shall be liable to pay to the

Parties so entitled as aforesaid the Amount of Compensation so claimed, and the same may be recovered by him, with Costs, by Action in any of the Superior Courts.

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I. Object of sect. 68 and nature of compensation recoverable.

This section provides for the ascertainment of compensation in cases where possession has been taken without any agreement between the owners of the land and the promoters of the undertaking; or where lands not taken have been injuriously affected by the execution of the works. In *Eaton v. Midland Great Western Ry.* (1847), 10 Ir. L. R. 310, it was stated by Blackburne, C.J., that this section and sects. 84 and 124 are not repugnant to each other. The amount of compensation is to be determined by arbitration or by a jury, at the option of the claimant.

The following case gives the general principles upon which a claimant is entitled to compensation for injurious affection.

Illustration.

"To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorised by the special Act, and that the damage was one for which he might have maintained an action if the work was not authorised by Parliament. . . . Then there is a third point which, looking to the language of the Acts of Parliament, it is obvious that the claimant must establish, viz., that the injury he complains of was an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of Parliament. To these propositions the judgment of the House of Lords [in *Ricket v. Metropolitan Ry.* (1867), L. R. 2 H. L. 175] has added another, which must be taken to be equally clear, and which we are bound to assent to and to act upon, and one which I cheerfully accept upon such high authority, and upon which I shall act to the best of my ability,—and that is, that the damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put; in other words, it must, as I read that judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property. Now that, of course, is to be taken with the limitation that a person who owns a house is not to be expected to pull it down in order to use the land for agricultural purposes. That would be pushing the judgment in *Ricket v. Metropolitan Ry.* (*ante*) to an absurd extent. The property is to be taken *in statu quo*, and to be considered with reference to the use to which any owner might put it in its then condition—that is, as a house": *per* Willes, J., in *Beckett v. Midland Ry.* (1867), L. R. 3 C. P. at p. 94.

NOTE.—This case was approved in *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243, and in *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259.

II. Nature of interest in the land taken or affected.

(a) Generally the section does not apply unless the amount claimed exceeds 50*l.* When the amount claimed does not exceed 50*l.*, recourse must be had to the procedure under sects. 22 and 24 (*ante*).

Nor does sect. 68 apply unless the interest in the land *taken* is greater than that of a tenant for a year or from year to year.

Illustrations.

(1) The master of the G. Grammar School held office on the terms that he should give three calendar months' notice before relinquishing his appointment, and two-thirds of the governing body, with the sanction of the Bishop of Lincoln, had power to remove him on three months' notice on June 21st or December 21st. Land occupied by him in respect of the mastership was taken by a railway, and he claimed compensation under sect. 68 of the Lands Clauses Act. It was *held* that he had no greater interest than as tenant for a year or from year to year, and could only claim under sect. 121: *R. v. Manchester, Sheffield and Lincolnshire Ry.* (1854), 4 El. & Bl. 88.

(2) A railway company, by excavating a street and erecting a hoarding, damaged a public-house and injured the business of the publican, who was a tenant from year to year; but they did not take possession of any part of the premises. The publican was *held* entitled to proceed for compensation under the 68th, and not under the 121st, section of the Lands Clauses Act: *In re Somers and the Metropolitan Ry., R. v. Middlesex (Sheriff)* (1862), 31 L. J. Q. B. 261.

(b) Miscellaneous cases relating to the rights of tenants for life, other limited owners, and occupiers.

Illustrations.

(1) Under a special Act compensation was claimed by a person who in 1823 became the assignee of a lease for fourteen years, granted in 1818, of premises on the estate purchased by a company. The lease contained covenants to yield up the premises, *with all fixtures and improvements*, at the end of the term, and *not to underlet or assign without leave*; but this latter clause had not been introduced in contemplation of any advantage to be taken of it by the landlord with reference to the present Act. The company suffered the lease to expire, and then ejected the tenant:—*Held*, that he was entitled to have compensation assessed for the loss, if any, sustained by him in respect of goodwill, or the chance of a beneficial renewal of the lease, but not for fixtures set up or purchased, or for improvements made by him, inasmuch as he had no legal interest in them; but *held* that these might nevertheless be considered by the jury in estimating the chance of a beneficial renewal: *R. v. Hungerford Market, Ex parte Gosling* (1833), 4 B. & Ad. 596.

(2) P. held premises under an agreement for one year, and afterwards to quit on three months' notice at any quarter day. He was not to underlet or give up possession to another, or make any alteration, without the consent of the landlord; and was to leave for his landlord's benefit all improvements or additions made during his occupation. He made certain improvements, and was afterwards ejected upon due notice to quit:—*Held*, that he was not entitled to compensation for such improvements under sect. 19 of the Hungerford Market Act, although the notice to quit was given by reason of the passing of that Act: *R. v. Hungerford Market, Ex parte Palmer* (1839), 9 A. & E. 463; 48 R. R. 563.

(3) If a railway company bought up the interest of a lessee and allowed the lease to expire before coming to terms with the lessor, they would have to acquire the land at the value at which it stood at the expiration of the lease: *Beaufort (Duke) v. Patrick* (1853), 17 Beav. 60.

(4) The owner of an annuity charged on land taken by a railway company claimed compensation; the company purchased the land from a prior incumbrancer under a power of sale. It was *held* that a notice to treat given by the company to the annuitant could not be treated as a contract of which specific performance would be enforced: *Hill v. Great Northern Ry.* (1854), 5 De G. M. & G. 66.

(5) A railway company entered upon land under an agreement with the supposed agent of a person, who was tenant for life only of the land, but whom the company treated as tenant in fee simple. Remaindermen and mortgagees obtained an injunction restraining the company from remaining in possession. *Perks v. Great Wycombe Ry.* (1862), 3 Giff. 662.

(6) Land held under a lease for years was taken by a railway company. The lessee claimed compensation by a notice which stated "the said lands and hereditaments are held by me on lease, and are used partly as and for private grounds, and partly for farming and agricultural purposes." The notice was *held* bad, because it did not state the quantity as well as the quality of the claimant's interest: *Healey v. Thames Valley Ry.* (1864), 5 B. & S. 769.

(7) A tenant for life received 3,000*l.* from a company in consideration of his not opposing their Bill. Part of the settled land was taken under the Act and the purchase-money paid into court. The tenant for life was ordered to pay the 3,000*l.* into court to be invested and applied for the benefit of the persons entitled to the estate: *Pole v. De la Pole* (1865), 2 Dr. & Sm. 420.

(8) Where there was a fund in court representing the fee simple value of land taken by a company, but the land had been increased in value by the outlay of a lessee under a void lease, an inquiry was ordered as to the value of the lessee's interest, and an interim investment was directed and a declaration was made that the reversioner was entitled to the fund minus the value of the lessee's interest: *In re Luntley* (1865), 14 W. R. 93.

(9) Where a company is in possession of land purchased by them, the tenant for life is entitled to have the purchase-money invested and the dividends paid to him though all parties have not executed the conveyance: *In re Wrey* (1865), 11 Jur. (N.S.) 296.

(10) Compensation may be awarded to a tenant for life of land for injury and inconvenience sustained by him independently of the value of land: *In re Collis* (1866), 14 L. T. 352.

(11) "Although, therefore, I thought at first that it was of no consequence if the interest proved was other than that claimed in the notice, I do not feel so sure about that now. I am not prepared to say that, if there was a claim for ninety years, or an interest commensurate with it, and on the trial, every traverse being taken, it was proved that the interest was only for eighty years, and not ninety, that that would not be fatal to the plaintiff's title to recover. But that is not this case, for here all the plaintiff does is to claim some interest under the lease and the agreements. It may be equitable or legal: all he says is that his interest, such as it is, is for the residue of a term of ninety-nine years. Then, again, with regard to the evidence of the allegation of interest, when the terms of the notice and pleadings are looked at, with the lease and the agreements, there does not appear to me to be any failure of proof. In other words, there is no evidence that the plaintiff was entitled to a less period than that specified in the notice to some interest or other": *per* Channell, B., in *Buccleuch (Duke) v. Metropolitan Board of Works* (1868), L. R. 3 Ex. at p. 329.

NOTE.—This case went to the House of Lords, but on another point.

(12) Under an Act which incorporated the Lands Clauses Act water was diverted from a mill-stream. The injury being permanent, the tenant for life of the mill was *held* entitled to claim compensation under sect. 68 of the Lands Clauses Act: *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99.

(13) Land was demised to M. for a term of sixty years, together with the colliery shaft, buildings and works thereon, and the minerals under the land demised and also under adjacent land of the lessor, comprising 335 acres, subject to a proviso that M. should be at liberty at any time during the term to sink a pit or pits in any part of the land, the surface of which had not been demised, the position of the pit or pits to be subject to the reasonable approval of the lessor, his heirs or assigns. Five acres of the land not demised as regards the surface were acquired by a railway company and used for their railway and works:—*Held*, that the moment for estimating M.'s interest was immediately before the company took the land, and that the fact that after they had taken the land it would become undesirable in their interest for pits to be sunk there did not afford any reasonable ground under the proviso for disapproving the position of any pit proposed to be sunk there; and that M. had such a substantial interest in the land as to entitle him to compensation, the amount of which was a matter for the arbitrator alone: *In re Masters and Great Western Ry.*, [1901] 2 K. B. 84.

(c) Rights of tenants where land is taken.

Illustrations.

(1) A tenant whose land was taken by a railway company voluntarily continued to occupy after the end of his term. He was *held* not entitled to compensation: *R. v. London and Southampton Ry.* (1839), 10 A. & E. 3; 50 R. R. 306.

(2) Money was lodged in court by a railway company as compensation for the interest of tenants in the land taken. It was *held* that the landlord had no lien for rent on the money, although rent was in arrear at the date of the lodgment: *Ex parte Carey, In re Great Southern and Western Ry.* (1847), 10 L. T. (O.S.) 37.

(3) A tenant at will who had agreed to give up possession to a railway company afterwards refused to do so, alleging that his sister had an equal interest in the land. No tender was made, but the money was lodged in court to the separate account of the tenant. He was *held* entitled to the money, but the Court refused to give costs: *In re Irish South Eastern Ry., Ex parte Kelly* (1849), 12 Ir. Eq. R. 398.

(4) Where the lessees of certain lands sold part of the property to a railway for the purposes of the undertaking:—*Held*, that the compensation received by the lessees had been paid for the interruption caused by the railway, and the consequent injury to the land, and that the lessees were not bound to account to the landlords for the amount paid or any part of it: *Peddie v. Brown* (1857), 3 Macq. H. L. 65. "This is an agreement entered into between the tenants . . . and the railway company with a view to the interest of the tenants; therefore there is no *jus quæsitum tertio* and there is no intention to give any compensation to the landlord. That, I take it, is the meaning of the doctrine of *jus quæsitum tertio*, whether the party be named or not, if there be a contract made for his benefit: in that case the contract may be enforced by him. I found my objection in this case to the right of the pursuer to recover upon this, that there is no trace of an intention to benefit any other than the tenants in the contract which they enter into with the railway company. They receive compensation, not for taking away part of the land, but for the interruption caused by the railway and the consequent injury done to the land, (and but for, *sic* (from 3 Jur. 1897)) the proportion of land that is taken and used for the purpose of the railway, and this was compensation given only to the tenants and not to the landlord,

and therefore the landlord cannot enforce any part of the contract": *per* Lord Wensleydale at p. 73, *ib.*

(5) The lease of a clayfield provided that the landlord might resume any part of the lands at his pleasure. A railway company acquired part of the lands under statutory powers. The tenant was *held* entitled to compensation because the right of resumption did not pass to the railway company, who had taken possession under their statute: *Solway Junction Ry. v. Jackson* (1874), 1 Ct. Sess. Cas. (4th series) 831.

(6) The compulsory taking by a railway company under their statutory powers of part of a landlord's estate is not to be regarded as equivalent to an exercise of a power reserved to the landlord so as to deprive a tenant of his claim to compensation: *Fleming v. Newport Ry.* (1883), 8 App. Cas. 265.

III. In order that the section may apply the land must be actually taken or injuriously affected.

Illustrations.

(1) The words in sect. 68, "lands which shall have been taken for or injuriously affected by the execution of the works," include such lands only as are actually taken or actually affected by the works. Therefore where a railway company served a notice to treat and the landowner served the company with a notice requiring them to issue their warrant to the sheriff to summon a jury to inquire into the value of the land, and no further steps were taken by the company, it was *held* that as no land was actually taken, an action was not maintainable to recover compensation: *Burkinshaw v. Birmingham and Oxford Ry.* (1850), 5 Ex. 475.

(2) Notice to treat was given in respect of certain lands by the Corporation of Liverpool, whose contractors without their knowledge, but with the assent of the tenants, brought waggons and rails and left them on the land. This was *held* not to be a taking of possession by the corporation: *Standish v. Liverpool Corporation* (1852), 1 Drew. 1.

(3) The owner of a leasehold house which was sublet to a tenant from year to year received a notice to treat. The company made arrangements with the yearly tenant and received the key from him. This fact was *held* to warrant a jury in finding that the company had taken possession so as to entitle the owner to compensation under sect. 68 of the Lands Clauses Act: *Barker v. Metropolitan Ry.* (1864), 17 C. B. N. S. 785.

(4) The London School Board, who had given a notice to treat, made a deposit and gave a bond under sect. 85 of the Lands Clauses Act, but did not actually enter on the land. It was *held* that the landowner could not claim compensation under sect. 68. The "taking" of lands for the purposes of sect. 68 means the actual possession of them: *R. v. Manley-Smith, In re Church and London School Board* (1892), 67 L. T. 197.

(5) A local authority which had statutory powers to erect and maintain "on, in, over or under" any street, poles and posts for the working of their tramways, erected one of these poles in the pavement, sinking the pole a depth of several feet:—*Held*, that this did not amount to a taking of land so as to entitle the owner of the soil in which the pole was sunk to maintain trespass. The right of such owner, if any, was under sect. 68 of the Lands Clauses Act for injurious affection of his land: *Escott v. Newport Corporation*, [1904] 2 K. B. 369.

IV. The Thames Conservancy.

Illustration.

The V. Railway Co. had statutory powers, which incorporated the Lands Clauses Act to build a bridge over the Thames, but they were not to do so until they had submitted

plans and obtained the consent of the conservancy, in whom the bed of the river was vested by a previous Act. This Act gave to the conservancy power to grant licences to erect piers, &c., receiving compensation. The conservancy consented to the erection of the bridge, and then claimed compensation under sect. 68 of the Lands Clauses Act for lands taken and injuriously affected:—*Held*, that the consent by the conservancy was not a voluntary licence by them, but a condition imposed on the company; that the conservancy were entitled to compensation; and that sect. 68 was the proper section under which to proceed: *Thames Conservators v. Victoria Station and Pimlico Ry.* (1868), L. R. 4 C. P. 59.

V. The principles on which compensation can be claimed for land which is injuriously affected when no other land held therewith is taken are explained in the following propositions, marked (a), (b), (c), and (d); but when other land held with the land injuriously affected is taken only principle (a) applies, and apparently also principle (c) to this extent that the subsequent user causing injury must be on the land taken (*see Illustration (3) below*).

NOTE:—The Illustrations are marked according as to whether land was taken or not.

(a) The injury must be caused by reason of an act authorised by statute.

(b) The injury must be such as would give rise to a right of action, if the act causing it were not authorised by statute.

(c) The injury must be caused by the execution of the works, and not by their subsequent user.

(d) The injury must be an injury to land, and not merely personal.

These principles will be illustrated separately.

(a) (i.) The injury must be the result of acts done under statutory powers.

Illustrations.

(1) Land taken by a railway company adjoined the site of a cotton mill, which belonged to the owner of the land taken. He was *held* entitled to compensation on account of the increased risk of fire to the mill from the passage of the trains and the execution of the company's works. *Held also* that the rule, that compensation can only be given for that which, unless authorised by the statute, would be an actionable wrong, does not apply where the act complained of is done on the land taken from the claimant: *In re Stockport, Timperley and Altringham Ry.* (1864), 33 L. J. Q. B. 251. "Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of a sinking of a well and causing the abstraction of water by percolation, the company have a right to say: 'We have done what we had a right to do as proprietor, and do not require the protection of any Act of Parliament

and we therefore have not injured you by virtue of the powers of the Act, and no cause of action has been taken away from you by the Act.' Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say: 'It is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage. Without the Act of Parliament everything you have done and are about to do in the making and using the railway would have been illegal and actionable, and is therefore matter for compensation according to the rule in question': *per* Crompton, J., at p. 253, *ib.* (Land taken.)

(2) K. claimed damages in respect of his house and land, alleged by him to be prejudicially affected by the works of a railway company. The arbitrator appointed awarded K. compensation—(1) for structural damage; (2) for damage done to goods on the premises; (3) for depreciation in the value of K.'s leasehold interest:—*Held*, that K. was entitled to all damages occasioned under these heads through the execution of the company's works: *Knock v. Metropolitan Ry.* (1868), L. R. 4 C. P. 131. (No land taken.) "The arbitrator finds in substance that the damage occasioned to the goods was caused by the execution of the works authorised by, and the exercise of the powers contained in, the several Acts of Parliament. It seems to me therefore that what the arbitrator has done is justified by the provisions of sect. 6 of the Railways Clauses Consolidation Act": *per* Byles, J., at p. 137, *ib.*

(3) "There is no ground for supposing that the Legislature intended to give compensation for any further or other injury than that occasioned by the operation of the Railways Clauses Act and the works authorised by the special Act, or that they intended in any way to extend the remedy to the exercise of the powers of the Act after the works had been executed. There is no reason *à priori* to suppose that any such intention could be anticipated in an Act which simply deals with the proprietary rights of the landowner and the mode of ascertaining his rights": *per* Lord Hatherley, C., in *City of Glasgow Union Ry. v. Hunter* (1870), L. R. 2 H. L. Sc. at p. 80. "As no part of the respondent's property has been injured by anything done on his land over which the railway runs, his right to compensation for damage appears to me to be precisely the same as if none of his land had been taken by the company. The case of *Brand* therefore conclusively establishes that the claim for compensation 'for damage caused by noise of trains and smoke' ought not to have been entertained by the jury. If there was an obstruction of light and air to the premises caused by the neighbourhood of the bridge, it would have been an injury which would have entitled him to compensation": *per* Lord Chelmsford at p. 83, *ib.* (Land taken.)

(4) A causeway and pier which ran from the garden of Montagu House to the Thames were taken for the purposes of the Thames Embankment. The owner of the house recovered compensation for the loss of the river frontage and the consequent loss of privacy, and the increase of dust and noise by the making and use of the embankment as a road, which injuriously affected the remainder of the property by diminishing its selling value: *Buccleuch v. Metropolitan Board of Works* (1872), L. R. 5 H. L. 418. "It seems to me to be quite clear that the umpire was entitled to consider, not only the damage which the plaintiff sustained by being deprived of the causeway, but also whether he was entitled to compensation in respect of damage otherwise sustained by reason of the embankment": *per* Lord Chelmsford at p. 460, *ib.* "And if I could think that the umpire really tried to estimate the compensation due to the Duke for the severance of his causeway from his garden, and had prodigiously erred in assessing the amount, I am not prepared to say that the award could be questioned. But it would be doing him great injustice to suppose that he did so; I think it quite clear that he applied the principle of the *Stockport Case* (*ante*) as it has been generally understood, that a part of the premises being taken, it let in the claimant to have damages assessed for everything": *per* Blackburn, J., in same case in court below (1870), L. R. 5 Ex. 221 at pp. 243, 244 (Land taken.)

(5) J. constructed (under a statute) a bridge over a river and took tolls from the persons using it. The statute protected him by enacting that no other bridge should be built within certain limits. Afterwards the defendants, under statutory powers, built a railway bridge within the above-mentioned limits :—*Held*, that J. had such an interest as would entitle him to compensation if he could show himself to have been injuriously affected within the meaning of the Railways Clauses Act of Lower Canada ; that it would be necessary for J. to prove loss of custom ; and that J. had no right to treat the railway bridge as being unlawfully built on the ground that he had not been given notice to treat before its construction : *Jones v. Stanstead Ry.* (1872), L. R. 4 P. C. 98. (No land taken.)

(6) A railway company took houses which lay on both sides of a passage which was used as a public right of way. The houses and the soil of the passage were the property of the same owner. The company made a tunnel under the passage. The owner was *held* entitled to compensation for the making of the tunnel : *Souch v. East London Ry.* (1874), 22 W. R. 566. (Land taken.)

(7) The following propositions were said by Lord Selborne in *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. at p. 276, to be established :—

“When a right of action which would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts.”

“Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which the trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation.”

“The obstruction by the execution of the works of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.” (No land taken.)

(8) Land let on long building leases was taken for the purpose of sewage works. The other land belonging to the same owner which was alleged to be injuriously affected consisted of about thirty acres, part of which was in hand, while other parts were let for short terms of years for brick-making. Of the thirty acres part was separated from the land taken by other land belonging to the same owner, in respect of which no compensation was claimed, and the rest by a railway. A jury gave 4,000*l.* for damage sustained or to be sustained by reason of the injuriously affecting of the thirty acres by the sewage works on the land taken ; and this award was upheld by the House of Lords : *Cowper, Esser v. Acton Local Board* (1889), 14 App. Cas. 153. “When lands are required for the purpose of a public undertaking, and the owner claims compensation for injury to other lands held therewith, I think the tribunal which assesses compensation is bound to take into consideration the purpose of the undertaking, the consequences likely to result from the execution of the works on the lands required, and any alteration in the character of the property which those works are calculated to bring about”: *per* Lord Macnaghten at p. 178, *ib.* (Land taken.)

(9) Pumps were employed in sinking a shaft under statutory powers. The noise of the pumping interfered with the comfort of an adjoining owner ; but he failed to obtain an injunction or damages, as the works were being properly carried on : *Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409. (No land taken.)

(10) A railway company having given M., a market-gardener, notice to treat for two acres of his market garden, the arbitrator, in estimating compensation, took into consideration these facts, viz.—(1) that for three years the ground had been under special preparation for fruit trees in glass-houses to be erected ; (2) that it would take three years to prepare ground for a like purpose ; (3) that the yearly profit M. would make amounted to 250*l.* :—*Held*, that the arbitrator had acted rightly in considering the above

elements, and that the award could not be disturbed: *Lanarkshire and Dumbartonshire Ry. v. Main* (1895), 22 Ct. Sess. Cas. (4th series) 912. (Land taken.)

- (ii.) The remedy for unauthorised injury arising from the construction or execution of the works or for the negligent or improper manner in which they are carried out is by action (and see cases on p. 354, *post*).

Illustrations.

(1) Land was flooded owing to the construction of a railway embankment. The railway company were not required by their Act to make flood openings in the embankment, and could not be compelled to do so by *mandamus*; but they were *held* liable for the flooding, which they might have prevented by proper caution; *Lawrence v. Great Northern Ry.* (1851), 16 Q. B. 643.

(2) The private Act of a waterworks company provided that all disputes respecting compensation, works, matters, or things should be determined by arbitration under the Lands Clauses Acts. The company blocked a drain by their works. It was *held* that the owner of the drain had a right of action: *Blagrove v. Bristol Waterworks* (1856), 1 H. & N. 369.

(3) An action was brought to recover damages for injury to a business caused by the erection of gasworks. It was *held* that the 68th section of the Lands Clauses Act only applied to cases where injury was occasioned by works necessarily done under the authority of the Act, and not to the case of injury by a careless or improper mode of working: *Imperial Gas Light and Coke Co. v. Broadbent* (1859), 7 H. L. Cas. 600.

(4) Where promoters were guilty of a wrong in not carrying out the direction of a statute which required the restoration of a branch railway, it was *held* that the proper remedy was a common law action in the common law courts: *Caledonian Ry. v. Colt* (1860), 3 Macq. H. L. 833.

(5) An action was brought against a railway company for injury by fire alleged to have been caused by a spark from an engine. It was *held* to be a question for the jury whether there had been negligence on the part of the company either as to the construction or the user of the engine: *Fremantle v. London and North-Western Ry.* (1861), 10 C. B. N. S. 89.

(6) An embankment made by a railway company, under statutory powers, was improperly constructed, so that adjoining property was flooded. The remedy in such a case is by action for damages, and not for compensation under the Lands Clauses Act: *Brine v. Great Western Ry.* (1862), 2 B. & S. 402.

(7) A baker brought an action against a contractor for injury to his oven. The contractor was carrying on his works under the authority of a local body, who were empowered by an Act to do the works in question. The Act contained provisions for making compensation for damage done by the works, and it was contended that the injury complained of was a subject for compensation. But the action succeeded, as it appeared that the works were done negligently: *Clothier v. Webster* (1862), 12 C. B. N. S. 790. "Carrying this sewer along the street . . . was clearly within the powers conferred [by sect. 135 of the Metropolis Management Act]; but the law requires that due care and skill shall be used in the execution of powers conferred on public bodies, and if, by the negligence of a public body in the execution of its statutory powers, damage is caused, for that damage the body is liable. *Lawrence v. Great Northern Ry.* (1851), 20 L. J. Q. B. 293, I take to be an authority to that effect. There a railway was constructed by the

defendants under the authority of their Act, by which an injury was caused to the plaintiff's land. An action was brought to recover damages for this injury, and the Court of Queen's Bench held that, as the company, by executing their works with proper caution, might have avoided the injury, the action could be sustained": *per Erle, C.J.*, at p. 318, *ib.*

(8) Where a local board had constructed a sewer leading into the river Wandle and the sewage discharged from the sewer killed the fish in the river and otherwise caused a nuisance:—*Held*, that the plaintiff (whose gardens and grounds abutted upon the river) was entitled to an injunction to restrain the further pollution of the water passing his garden and grounds: *Bidder v. Croydon Local Board* (1862), 6 L. T. 778.

(9) The L. Board of Works constructed new sewers, which carried sewage into a stream tributary to the P. river. Previously a small amount of sewage had been carried into the river. The river ran through land belonging to C., which was outside the L. district and the Metropolis. Material injury was done to C.'s land by the execution of the works:—*Held*, that the injury to C. was not occasioned by the exercise by the board of compulsory powers contained in the Metropolis Management Act, 1855, and that C. was entitled to maintain an action against the board: *Cator v. Lewisham Board of Works* (1864), 34 L. J. Q. B. 74.

(10) The Metropolitan Board of Works had no power under sect. 135 of the Metropolis Management Act, 1855, to erect any works on the bed or soil of the river Thames, without first obtaining the consent of the Admiralty, pursuant to sect. 27 of the Main Drainage Act, 1858, and of the Conservators of the Thames, pursuant to sect. 28; and therefore they were liable to an action at the suit of the owner of a vessel which sustained damage from grounding on a pile negligently placed on the foreshore by a contractor employed by them: *Brownlow v. Metropolitan Board of Works and Aird* (1864), 16 C. B. N. S. 546.

(11) A local board made sewers by virtue of statutory powers. For the purpose of flushing the sewers water was abstracted from a river so that a mill became unworkable. The mill-owner obtained a *mandamus* to the local board for compensation. It was *held* that he ought to have proceeded by action: *R. v. Darlington Local Board* (1865), 6 B. & S. 562.

(12) A waterworks company, under their statutory powers, made a reservoir which fouled a stream. The owner of some dye works on the stream below the reservoir obtained an injunction restraining the company from fouling the stream, which they were not authorised to do: *Clowes v. Staffordshire Potteries Waterworks* (1872), L. R. 8 Ch. 125.

(13) A railway company carried on works, under their statutory powers, without due regard to the safety of an adjoining house. The owner obtained an injunction restraining them from working until they had secured his property from injury: *Biscoe v. Great Eastern Ry.* (1873), L. R. 16 Eq. 636.

(14) Improper construction of a company's works caused injury by flooding when heavy rain occurred. The owner of the flooded land obtained an injunction restraining the company from allowing water to flow over the land, and was *held* not obliged to have damage assessed under the Lands Clauses Act: *Keates v. Holywell Ry.* (1873), 28 L. T. 183.

(15) By a private Act, which incorporated the Gas Works Clauses Act, 1847, a gas company were (provisionally) bound to supply gas, the mode of supply and the quality of the gas being prescribed. It was *held* that the company was not justified in causing a nuisance by the emission of sulphuretted hydrogen, even if the gas could not otherwise be made of the requisite purity: *Att.-Gen. v. Gas Light and Coke Co.* (1877), 7 Ch. D. 217.

(16) A corporation were empowered by statute to collect the water of certain streams in a reservoir, and to transmit them through a watercourse to the river Bann. They neglected to clean the channel of the watercourse, so that neighbouring lands were flooded. It was *held* that their Act did not relieve them from the obligation to clean the watercourse : *Geddis v. Bann Reservoir* (1878), 3 App. Cas. 430.

(17) By sect. 389 of the Merchant Shipping Act, 1854 (sect. 634 of the Act of 1894), the management of lighthouses, buoys, and beacons in England was vested in the Trinity House ; by sect. 417 (sect. 648 (1) of the Act of 1894) all dues received by the Trinity House were to be carried to the Mercantile Marine Fund ; other sections gave the Board of Trade control over the expenditure of the Trinity House, and directed the audit of their accounts by the Commissioners of Audit :—*Held*, that the Trinity House was a corporation, and was not in the position of a great officer of State, and was liable, like any other body, for negligence in the performance of its duties : *Gilbert v. Trinity House Corporation* (1886), 17 Q. B. D. 795.

(18) A main belonging to a waterworks company burst, and did considerable damage to property. The company were authorised by statute to lay the main and were not guilty of negligence, and an action for damages against them failed : *Green v. Chelsea Waterworks* (1894), 70 L. T. 547.

(b) Nature of injury affording ground for compensation.

- (i.) The injury must be such as would give rise to a right of action, if the act causing it were not authorised by statute.

Illustrations.

(1) A railway company by their works cut off communication with a ferry appurtenant to C.'s land :—*Held*, that the ferry was a private right for which compensation might be assessed : *In re Cooling and Great Northern Ry.* (1849), 6 Rail. Cas. 246. (No land taken.)

(2) A railway company made a level crossing over a road and erected gates at each side of the railway. A landowner had a right of way over the road, and was given a key of the gates, which were kept locked. A person standing at the level crossing could not see a train coming in one direction until it was at a distance ordinarily covered in seventeen seconds. It was *held* that the landowner's land was injuriously affected : *Glover v. North Staffordshire Ry.* (1851), 16 Q. B. 912. (No land taken.)

(3) A claim for compensation was made on the ground of vibration caused by the passing of trains, and because the property was overlooked from the railway. It was *held* that the circumstance of the overlooking was no ground for compensation ; and that compensation might be awarded for vibration arising during, but not after, the construction of the railway : *Penny v. South-Eastern Ry.* (1857), 7 El. & Bl. 660. "As to the vibration, I am inclined to think that Penny would be entitled to some amount of compensation [*i.e.*, vibration occurring during the making of the line]. But it is unnecessary to go into that question, because I am clearly of opinion that he is not entitled to any compensation for the overlooking of his premises by the railway. It might as well be said that the owner of a house was entitled to compensation on account of the view from it, half a mile off, having been obstructed by the railway" : *per* Campbell, C.J., at p. 669, *ib.* (No land taken.)

(4) In the year 1855 the Metropolitan Sewers Commissioners began the construction of a sewer in the high road leading from Blackheath to Lewisham. As the works approached S.'s estate, a bed of clay underlying the gravel at the surface was cut through, the result

being that a series of ornamental ponds constructed years before by S. were drained and the spring which supplied them with water ceased to yield any. Shortly afterwards the Lewisham District Board made a sewer into the main sewer within the band of clay, which formerly retained the water, whereby the springs were wholly diverted from their natural course and the ponds became dry:—*Held*, that neither the commissioners nor the district board could be considered as being clothed with either the rights or the obligations of ordinary landowners; that an injunction could not be granted to restrain the continuance of either sewer, or to compel the construction of a water-tight sewer; and that the plaintiff's only remedy was in compensation for prejudicial affection: *Stainton v. Woolrych* (1857), 26 L. J. Ch. 300. (No land taken.)

(5) By a drainage Act, if any person, after the commissioners or any person employed or authorised by them shall have begun to carry the statute into execution shall sustain damage or injury in his lands or chattels by or in consequence of any act of the commissioners or their servants, the damage or injury shall be ascertained by a jury before the sheriff:—*Held*, that the section applied only to the authorised acts of the commissioners and to damage resulting therefrom; but, assuming it to extend to unauthorised acts, in this case the cause of action was for an omission or nonfeasance, and was not the subject of compensation within the section: *Coe v. Wise* (1866), L. R. 1 Q. B. 711. (No land taken.)

(6) "What are the principles which regulate the liabilities of such a body as the Mersey Docks and Harbour Board? Where such a body is constituted by statute, having the right to levy tolls for its own profit, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair": *per* Lord Cranworth, C., in *Mersey Docks v. Gibbs* (1866), L. R. 1 H. L. at p. 122. (No land taken.)

(7) The plaintiff carried on business upon premises consisting of a house, warehouse, stables, &c., near a draw-dock leading into the river Thames. The dock was free and public, but was used chiefly by the plaintiff and certain other persons whose premises were adjacent to it. A roadway existed between the edge of the dock and the plaintiff's premises which had an enhanced market value by reason of their proximity to the dock. The defendants, in making an embankment under their private Acts, filled up and destroyed the dock, and thereby the plaintiff's premises became diminished in value in the market:—*Held*, that the plaintiff was entitled to compensation under sect. 68 of the Lands Clauses Act, as his lands had been injuriously affected by the defendant's works: *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243. (No land taken.)

NOTE.—This case was followed in *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259.

(8) In January, 1872, the predecessor in title of A. obtained by feu contract from a superior a building lot which was situated at the south side of an estate. A plan was incorporated with the contract, and it showed the whole estate divided up into feuing or building lots. Several streets running east and west were shown, and one, twenty-four feet wide, connecting the turnpike road on the north with another road on the south, and forming one side of A.'s feu. The lot was conveyed "together with free ish and entry thereto by the streets laid down on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power was that the superior "shall have full power and liberty to vary and alter the said plan or streets or roads delineated thereon, in so far as regards the ground not already feued." In July, 1872, a railway company gave the superior statutory notice that they intended to take a strip of ground running from east to west through the estate. In 1877 the company executed the works, which cut off all access for carriages by the street marked on the plan running from the south to north, twenty-four feet wide. None of A.'s land was taken. In an action by the railway company to restrain A. from taking further proceedings in a claim for compensation for lands alleged to be injuriously affected, under

sect. 6 of the Railways Clauses (Scotland) Act, 1845 :—*Held*, that A. was not entitled to compensation because—(1) the access in question had not been “opened” in the sense meant in his feu contract before the statutory notice ; (2) there was no obligation in the feu contract upon the superior to carry out his feuing scheme and give the feuars at some future time access along any of the roads or streets marked on the plan : *held also* that where there is an implied obligation by the superior to prosecute his feuing scheme for the benefit of the feuars, the latter have an interest in the roads and streets delineated on the feuing plan sufficient to sustain a claim for compensation : *Fleming v. Newport Ry.* (1883), 8 App. Cas. 265. (No land taken.)

(9) The L. T. and S. Railway Co. acquired land upon which they commenced to erect warehouses, which, when completed, were to be about 100 feet high. P. & Co. were the lessees of warehouses immediately fronting the site of the company's premises. They called the attention of the company to the fact that the erection of the new warehouses would render it impossible for them to continue their business owing to the diminution of light and air. P. & Co. held their premises under a lease which was terminable in November then next on giving six months' notice, in default of which the lease would continue for fourteen years more ; and they asked the company whether, in view of the fact of their having to pay compensation, they would take an assignment of the lease instead of leaving it to be terminated by notice. The company declined to take any steps in the matter ; P. & Co. gave notice to terminate their tenancy in November. In September preceding the termination of their tenancy P. & Co. claimed compensation :—*Held*, that they could not claim compensation on the footing that they were entitled to a fourteen years' lease—their act in terminating the tenancy not being due to the acts of the company ; and, further, that they could not claim compensation for merely prospective injury : *R. v. Poulter* (1887), 20 Q. B. D. 132. (No land taken.)

(10) In 1875 W. purchased two lots of a building estate, and entered into covenants that no buildings (except bay windows or porches) should be erected within thirty feet of the northern boundary without the vendors' consent, and that no offensive trade should be carried on upon the land. After W.'s death, F. purchased one of the lots, and entered into a similar covenant. In 1894 a school board bought the land from F., and the conveyance was made subject to all restrictions to which F. was subject. The board proposed to erect a school which would have certain projections within the thirty-foot line. The plaintiffs sought to restrain the board from completing the building :—*Held*, that the school board, taking land by agreement under the Elementary Education Act, 1870 (sect. 20 of which incorporates the Land Clauses Act with that Act), were not liable to an action for breach of a restrictive covenant, and that the injunction must be refused, leaving the plaintiffs to recover compensation under sect. 68, if they could show themselves to have been injuriously affected : *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437. (No land taken.)

(11) A. was the lessee of land under a lease containing the usual covenant for quiet enjoyment. A railway company purchased the reversion of the property, and executed certain works, the effect of which was to cause structural injury to A.'s house, and to render for some time the access to his premises less convenient. The company were not guilty of any excess of their powers or of any negligent execution of them :—*Held*, that A. was entitled to compensation, recoverable by him under the Lands and Railways Clauses Acts : *Manchester, Sheffield and Lincolnshire Ry. v. Anderson*, [1898] 2 Ch. 394. (No land taken.)

(12) The L. Company sold land to A. subject to a restrictive covenant not to erect thereon “any building other than private dwelling-houses.” The M. Railway Co., with notice of the covenant, purchased the land for the purposes of their undertaking, and erected an embankment on the land :—*Held*, that the erection of the embankment was a breach of the covenant, which injuriously affected the L. Company's adjoining land, and that the L. Company were entitled to compensation under sect. 68 of the Lands Clauses Act ;

Long Eaton Recreation Grounds Co. v. Midland Ry., [1902] 2 K. B. 574. "Is the breach of a restrictive covenant the subject of compensation under sect. 68? In point of principle, I cannot see why it should not be. A distinction has been drawn in cases under this section between injury to the person who happens for the time being to be owner of the land, and damage to the value of the land itself. If the damage in respect of which compensation is sought is only incident to the particular purpose for which the owner is occupying the land, that is held to be excluded from compensation; but if the market value of the land is affected, then the land is affected. It is a matter of common sense that when by covenant, by an easement being attached, or in any other way the value of the land is enhanced, and the railway company subtract a portion of the value by making their railway, they are injuriously affecting the land. The matter was discussed in *Beckett v. Midland Ry.* (L. R. 1 C. P. 241) by the late Sir James Shaw Willes, and it was pointed out that while an annoyance which the owner of a particular piece of land has to suffer in common with everyone who lives near a railway is not subject-matter for compensation, the special subtraction of any right incident to the land is. He gave as an instance the case of land approached by a broad road, which, by the operations of a railway company, has been narrowed, and pointed out that with regard to land, or a house on the land, injuriously affected by there being a narrow and difficult approach instead of a wide and easy one, it was obviously a case of injuriously affecting": *per* Collins, M.R., at p. 581, *ib.* (No land taken.)

(ii.) If no action would have lain, no compensation can be recovered.

Illustrations.

(1) The Hungerford Market Act authorised the erection of a market house, and enacted that if any injury should be done to any property by the taking down of any buildings for the purposes of or in the execution of the Act, compensation was to be assessed in the manner provided for ascertaining the value of lands to be purchased:—*Held*, that injury done to a house not specified in the Act, by taking down an adjoining house, which also was not specified, but had been purchased by the company, and which was taken down to make the avenue, was not an injury for which a jury could be summoned to make compensation under the Act; and that taking down a party wall between the two houses was not such an injury: *R. v. Hungerford Market, Ex parte Eyre* (1834), 1 A. & E. 676. (No land taken.)

(2) Promoters bought a house under the authority and for the purposes of their Act. They pulled down a party wall which had been condemned, and the owner of the adjoining house paid half the cost of rebuilding it. The tenant of the adjoining house was *held* not entitled to compensation, as the promoters only did what might have been done by any person who purchased the house which they had bought: *R. v. Hungerford Market, Ex parte Yeates* (1834), 1 A. & E. 668. (No land taken.)

(3) Under a private Act a company pulled down a number of houses and intercepted thoroughfares. This diminished the number of persons resorting to a public-house. It was *held* that the tenants of the public-house were not entitled to compensation for loss of business: *R. v. London Dock* (1836), 5 A. & E. 163; 44 R. R. 387. (No land taken.)

(4) The prosecutor was the owner of an estate which had been purchased by the testator, under whose will he claimed, in 1838. It was situate upon a bed of gravel, which was itself imbedded in a basin of clay, extending under the estate and adjacent land. Water, which rose through the gravel bed by means of natural springs, was collected in a small pond, and thence, overflowing the edge of the clay basin, formed a rivulet which supplied other ponds and was used by the prosecutor for watering his gardens and horses. The defendants, as commissioners of sewers, in the course of making a sewer in April, 1855, cut through the two beds of gravel and clay at a short distance from the estate, and

the effect of the cutting was to drain the springs in the gravel and to prevent them from finding their way into the pond and supplying the rivulet and the other ponds :—*Held* (on the authority of *Chasemore v. Richards* (1859), 7 H. L. C. 349), that the prosecutor was not, at common law, entitled to compensation from the commissioners in respect of the abstraction of the water. By sect. 50 of stat. 11 & 12 Vict. c. 112, where any work done by the commissioners under the provisions of the Act “shall interfere with or prejudicially affect any ancient mill, or any right connected therewith, or other right in the use of water, full compensation shall be made to all persons sustaining damage thereby,” &c. By sect. 69 it is provided that full compensation shall be made out of the rates, as the commissioners shall direct, to all persons sustaining damage through the exercise of the powers of the Act :—*Held* (by Wightman and Mellor, JJ.), that the prosecutor was not entitled to recover compensation under either of the above sections; by Cockburn, C.J., that he was so entitled under sect. 50, as he had a right to the water after it had risen, and that right had been interfered with and prejudicially affected : *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710. (No land taken.)

(5) A hoarding was erected in a street for the reconstruction of a sewer. The access to a livery stable was thereby rendered less convenient. The obstruction was temporary only, but it diminished custom. It was *held* that the livery-stable keeper had no cause of action, and no right to compensation under sect. 135 of the Metropolis Management Act, 1855 : *Herring v. Metropolitan Board of Works* (1865), 19 C. B. N. S. 510. (No land taken.)

(6) The erection of a gasometer obstructed the view of certain limekilns from the road. The owner of the kilns failed to restrain the erection of the gasometer as prejudicial to his place of business : *Butt v. Imperial Gas Co.* (1866), L. R. 2 Ch. 158. (No land taken.)

(7) Houses were cracked and injured by the making of a sewer. They had been built within twenty years on old foundations in the place of lighter buildings. The local board which made the sewer was not obliged to make compensation for damage, which would not have been actionable if they had not been acting under the Public Health Act, 1848 (repealed by 38 & 39 Vict. c. 55) : *Hall v. Bristol Corporation* (1867), L. R. 2 C. P. 322. (No land taken.)

(8) In June, 1865, a railway company served on F. (a publican), who was a tenant from year to year, a notice to treat, and of their intention at the end of six months to enter the premises. F. sent in particulars of claim to the company, but the latter did nothing further until 1868. F. continued to carry on his business on the premises. In March, 1868, the company served a summons on F. for the purpose of having his claim to compensation disposed of, and the matter came before a police magistrate. F. claimed compensation for the depreciation in the value of his interest, which had taken place in the interval since the expiration of the six months by reason of the execution of the company's works, the custom of the public-house having been greatly reduced by the pulling down of the neighbouring houses taken under the company's powers :—*Held*, that this depreciation was not the subject of compensation, and the claim had been rightly rejected : *R. v. Vaughan* (1868), L. R. 4 Q. B. 190. The claimant “cannot claim both the value of his interest and goodwill in the premises at the time the company gave him notice, and also for depreciation in the value of such interest caused by the company's works, and the consequent loss of profits; the latter was the result of his own act, for it was his own fault that he continued to carry on the business after the six months had expired” : *per* Cockburn, C.J., at p. 195, *ib.* (Land taken.)

(9) Under a drainage Act certain shoals were removed from a river and floods were said to have been caused by their removal. It was *held* that if riparian owners other than the drainage commissioners could have removed the shoals by virtue of a common-law right, the removal formed no ground for compensation : *Rhodes v. Airedale Drainage Commissioners* (1876), 1 C. P. D. 402. (No land taken.)

(10) A railway company, under statutory powers, made a bridge and footway across a river above an ancient ferry. The traffic across the ferry fell off in consequence. No compensation was recoverable—because an action for disturbance of the ferry could not have been maintained if the bridge had been erected without statutory authority, and because the injury to the ferry was occasioned by the user, and not by the construction, of the works: *Hopkins v. Great Northern Ry.* (1877), 2 Q. B. D. 224. (No land taken.) And see *Coxes, &c. Council v. Southampton, &c. Council*, [1905] 2 K. B. 287.

(11) The B. Canal Co. on the occasion of extraordinary rainfall opened a sluice into a brook, which overflowed into T.'s mines. If the company had not opened the sluice the canal bank would have burst, and the mines would have been flooded. The course taken by the company was a prudent one, and the most effectual under the circumstances. The only damage caused to the mines was that they were flooded earlier than they would otherwise have been:—*Held*, (1) even assuming that it was a wrongful act to open the sluice, it was *injuria absque damno*; (2) that the case did not fall within the compensation clauses in the Acts of Parliament: *Thomas v. Birmingham Canal Co.* (1879), 49 L. J. Q. B. 851; *Nichols v. Marsland* (1876), 2 Ex. D. 1, followed. (No land taken.)

(12) The abstraction of salt from a bed beneath a highway caused a subsidence. Houses abutting on the highway subsided with it. As the highway was liable to be flooded, the local authority raised it; the owners of the houses raised them to the level of the highway and claimed compensation. This claim failed, there having been no trespass, and the local authority having acted within their powers as surveyors of highways: *Burgess v. Northwich Local Board* (1880), 6 Q. B. D. 264. (No land taken.)

(13) An underground tunnel diminished the flow of water to and from springs which supplied public waterworks. The owners of the waterworks failed to obtain an injunction restraining the making of the tunnel: *Bradford Corporation v. Pickles*, [1895] A. C. 587. (No land taken.)

(c) The injury must be caused by the execution of the works, and not by their subsequent user.

Illustrations.

(1) Under statutory powers a railway for locomotive engines was constructed near an ancient highway. The company were indicted for a nuisance, on the ground that the engines, with their furnaces, stoves and fires, exhibited "terrific and alarming appearances," and made "divers loud explosions, shocks and noises," whereby it became dangerous to pass along the highway. *Held* that the Legislature must have contemplated this when it sanctioned the use of the engines: *R. v. Pease* (1832), 4 B. & Ad. 30; 38 R. R. 207; approved in *Hammersmith and City Ry. v. Brand* (1869), L. R. 4 H. L. 171, and in *London, Brighton and South Coast Ry. v. Truman* (1885), L. R. 11 App. Cas. 45; and disapproved in *Powell v. Fall* (1880), 5 Q. B. D. 597 (a case of a locomotive on a highway). (No land taken.)

(2) The vibration caused by the passage of trains through a tunnel spoiled beer in the cellars of an inn at Huddersfield. An interim injunction, which the railway company had obtained restraining the owner of the inn from taking proceedings under the Lands Clauses Act in respect of such damage, was dissolved: *London and North-Western Ry. v. Bradley* (1851), 3 Mac. & G. 336. (No land taken.)

(3) Sparks from a railway engine set fire to a wood. The company were guilty of no negligence, and took every precaution against accident. They were *held* not responsible for damage done by the fire: *Vaughan v. Taff Vale Ry.* (1860), 5 H. & N. 679; approved in *Hammersmith and City Ry. v. Brand*, *post*. (No land taken.)

(4) A claimant is not entitled to compensation under sect. 68 of the Lands Clauses Act or sect. 6 of the Railways Clauses Act, where all the damage is occasioned, not by the construction of the railway or by the execution of the works, but by the use of the railway

legalised by the special Act: *Brand v. Hammersmith and City Ry.* (1865), L. R. 1 Q. B. 130, 143, 147; affirmed by the House of Lords, L. R. 4 H. L. 171. (No land taken.)

(5) "To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorised by the special Act, and that the damage was one for which he might have maintained an action if the work had not been authorised by Parliament." And further, "that the injury he complains of was an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action if the works which occasioned it had not been executed under the sanction of Parliament": *per* Willes, J., *Beckett v. Midland Ry.* (1867), L. R. 3 C. P. 82. (No land taken.)

(6) "I must repeat what I said in *Ricket v. Metropolitan Ry.*: 'The criterion of a party's right and damages under the clauses of the Railway Companies Acts is correctly stated by Lord Campbell in *Penny v. South-Eastern Ry.*—that unless the particular injury would have been estimable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed.' To which I must add . . . the observation of Lord Cranworth in the case of the *Caledonian Ry. v. Ogilvie*—'that it does not follow that a party would have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been, not only an indictment, but a right of action.' Assuming that before the passing of their Act the company would have been liable to an action for the injury caused to the plaintiffs' house, it is necessary for the plaintiffs in the first place to establish that the company's Act has taken away the remedy by action in order to open the way to their claim to compensation. If the cases of *R. v. Pease* and *Vaughan v. Tuff Vale Ry.* were rightly decided this question has been determined. . . . I think these cases were rightly decided": *per* Lord Chelmsford, C., in *Hammersmith Ry. v. Brand* (1869), 38 L. J. Q. B. at p. 275. (No land taken.)

(7) "It seems to us that the construction of the railway, as distinguished from the user of the railway after it was constructed, was not the proximate cause of the damage suffered by the owner of the ferry, for this simple reason—that if the railway and foot-bridges had only been constructed, and never opened to the public or used, it is plain the owner of the ferry would have suffered no damage whatever": *per* Mellish, L.J., in *Hopkins v. Great Northern Ry.* (1877), 46 L. J. Q. B. at p. 272. (No land taken.)

(8) In 1790 certain common lands were inclosed under an inclosure Act, and the commissioners set out a private carriage road and driftway for the use of the owners of certain lands. The G. W. Railway Co., under their statutory powers, acquired a small part of these lands, on which they erected a cattle pen, and used the road for the purpose of driving cattle which they were about to convey on their railway. At the time of the award the user of the road was only by way of access to a few meadows used for agricultural purposes:—*Held*, that the company were not restricted to the user for the purposes for which access would be required at the time of the grant, but were entitled to use the road as they did: *Finch v. Great Western Ry.* (1879), 5 Ex. D. 254. (No land taken.)

(9) The Metropolitan Poor Act, 1867 (30 & 31 Vict. c. 6), authorised the formation of district corporations for the care of the sick poor, and authorised the corporations to purchase land by agreement and build hospitals. The appellants purchased land and built a hospital at Hampstead, which was well conducted, but was used for small-pox and fever patients, and was a nuisance to the neighbourhood. In an action by adjoining owners, it was *held* that the terms of the statute being permissive and not imperative, it was intended that the discretion conferred upon the corporations should be exercised in strict conformity with private rights, and that they could not plead the statute as a defence. An injunction was granted: *Metropolitan Asylum District v. Hill* (1881), 6 App. Cas. 193. (No land taken.)

(10) "The onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good those two propositions—in the first place, that such are the imperative orders of the Legislature, and in the second place that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to show that the Legislature has directed it to be done": *Truman v. London, Brighton and South Coast Ry.* (1883), 25 Ch. D. at p. 440. (No land taken.)

(11) A railway company, under a power given by their Act, used land for the purposes of a cattle yard. There was no negligence in such user, but it constituted an actionable nuisance. It was *held* that the owners of adjoining houses were not entitled to an injunction restraining the company from so using the land: *London, Brighton and South Coast Ry. v. Truman* (1885), 11 App. Cas. 45; distinguished in *Jordeson v. Sutton Gas Co.*, [1899] 2 Ch. 217, *infra*. (No land taken.)

(12) A small-pox hospital is not necessarily a nuisance, and a public body proposing to erect one will not be restrained (on that ground) unless it is proved that a nuisance will be caused: *Withington Local Board v. Manchester Corporation*, [1893] 2 Ch. 19. (No land taken.)

(13) B., acting under a provisional order confirmed by statute, worked a tramway, and, using the best system of electric traction, interfered with the electric currents used by a telephone company under licence from the Postmaster-General:—*Held*, that B., acting under the provisional order, was protected from liability for the exercise of the powers without negligence: *National Telephone Co. v. Baker*, [1893] 2 Ch. 186. (No land taken.)

(14) An aperture which ventilated a tunnel was enlarged, and thereby the quantity of smoke, steam and foul air which came through it was increased, so that an adjoining house was depreciated in value. The tenant of the house was *held* not entitled to compensation, as the nuisance arose from the working of the railway: *Att.-Gen. v. Metropolitan Ry.*, [1894] 1 Q. B. 384. (No land taken.)

(15) "A railway company, when it has acquired the land on which its rails are laid, requires no statutory power to run trains over it; but the company does want statutory power to do so in such a way as to commit an unavoidable nuisance without being exposed to actions for damages, and the company has such a power accordingly": *per* Lindley, L.J., in *Emsley v. North-Eastern Ry.*, [1896] 1 Ch. at p. 429. (No land taken.)

(16) Under their statutory powers the defendants excavated their land for the purpose of erecting a gasometer. In draining their excavation they withdrew a large quantity of running silt from under the plaintiff's land, and thus caused a subsidence of the surface, with consequent structural injury to his houses. It was *held* that the defendants had no statutory authority so to construct their works as to occasion a nuisance; the fact that sect. 9 of the Gasworks Clauses Act, 1871, expressly preserved this liability for any nuisance distinguished the case from *London, Brighton and South Coast Ry. v. Truman* (*supra*): *Jordeson v. Sutton, &c., Gas*, [1899] 2 Ch. 217. (No land taken.)

(17) The N. Corporation erected a small-pox hospital. A *quia timet* action was brought to restrain the corporation from using it as such:—*Held*, that the establishment of such a hospital, properly conducted, is not necessarily such a serious source of danger to persons residing, working or passing by within a distance of fifty feet as to constitute a private or public nuisance which will be restrained in a *quia timet* action: *Att.-Gen. v. Nottingham Corporation*, [1904] 1 Ch. 673. (No land taken.)

(d) The injury must be an injury to land, and not merely personal.

Illustrations.

(1) Under a local Act it was *held* that no compensation was due to the owners of a brewery for deterioration by dock works of the water of the Avon, from which the brewery had been supplied; the use of the water having been common to all the King's subjects: *R. v. Bristol Dock* (1810), 12 East, 429; 11 R. R. 440. (No land taken.)

(2) Tenants of a public-house who claimed compensation under a local Act for loss of profits arising from the pulling down of houses and the interception of neighbouring thoroughfares were *held* not entitled to it: *R. v. London Dock* (1836), 5 A. & E. 163; 44 R. R. 387; approved in *Ricket v. Metropolitan Ry.* (1867), L. R. 2 H. L. 175, *infra*. (No land taken.)

(3) A level crossing was made across a public highway forming the principal access to a gentleman's residence, and within a few yards of his gate. He failed to obtain damages, claimed on the ground that the level crossing would render it "dangerous and alarming to ladies and others" to pass to and from the house along the highway: *Caledonian Ry. v. Ogilvy* (1856), 2 Macq. H. L. 229. (No land taken.)

NOTE.—See, as to this case, *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259, *infra*.

(4) On a traverse for damages, *held*, that the traverser was not entitled to compensation for the deterioration in value of his house and place, as a villa residence, by loss of view: *Goodbody v. Midland Great Western Ry.* (1862), Irish Reserved Cases, 20. (No land taken.)

(5) A railway company, under their Act, made a level crossing over a road over which there was a public right of way. It was *held* that adjoining owners were not entitled to compensation in respect of the level crossing. "It is an inconvenience which is common to all the Queen's subjects": *per* Erle, C.J., in *Wood v. Stourbridge Ry.* (1864), 16 C. B. N. S. 222. (No land taken.)

(6) Loss of trade to a public-house owing to difficulty of access arising from the works of a railway company done under their special Act is not a subject of compensation, the damage being personal, and not an injury to the land: *Ricket v. Metropolitan Ry.* (1865), L. R. 2 H. L. 175. "As to the argument that compensation is in practice allowed for the profits of the trade where land is taken, the distinction is obvious; the company claiming to take land by compulsory process expels the owner from his property, and are bound to compensate him for all the loss caused by the expulsion, and the principle of compensation then is the same as in trespass for expulsion: and so it has been decided in *Jubb v. The Hull Dock Co.* (1846), 9 Q. B. 443, 457. . . . But the present claim under sect. 68 of the Lands Clauses Act is made in respect of lands injuriously affected where no land has been taken; and if it were held that a claim could be sustained for every loss of profit which a jury could attribute to an obstruction of a highway by a railway company in the execution of their works, the liabilities in a dense population would be innumerable. The common law limited the remedy for obstructions of public rights to indictment, unless there was special damage, to prevent innumerable actions; and the same reason applies in full force to prevent innumerable claims on account of an alleged loss of profit caused by obstructing a thoroughfare": *per* Erle, C.J., in *Ricket v. Metropolitan Ry.* (1865), 5 B. & S. at p. 163. (No land taken.)

NOTE.—*Ricket v. Metropolitan Ry.* was distinguished in *Beckett v. Midland Ry.* (1867), L. R. 3 C. P. 82, on the ground that in the former case the compensation claimed was in respect of a mere temporary obstruction and interruption to the plaintiff's business; and, further, that in that case the injury was only indirect:

approved in *Winterbottom v. Derby (Lord)* (1867), L. R. 2 Ex. 316; explained, distinguished, and approved in *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243; distinguished in *Fritz v. Hobson* (1880), L. R. 14 Ch. D. 542, on the same grounds as in *Beckett v. Midland Ry. (supra)*; see also the comments in *Ford v. Metropolitan Ry.* (1886), 17 Q. B. D. 12.

(7) Compensation was claimed in respect of a public right to take water from the river Thames, and also in respect of the right to use a public draw-dock. The claimants carried on the business of potters in the immediate neighbourhood, but the rights in question were in no way appurtenant to their premises. The rights could not be exercised in consequence of the embankment works; but the claim for compensation failed. "The damage complained of is not an injury to the land or to any interest therein": *per* Hannen, J., *R. v. Metropolitan Board of Works* (1869), L. R. 4 Q. B. 358. (No land taken.)

(8) The defendants, under their Act of Parliament, took land under which the plaintiffs had water-pipes. The pipes were buried beneath the defendants' embankment and ceased to be used. Afterwards, in making a tunnel, the defendants took up the pipes. The plaintiffs claimed compensation for the value of the pipes:—*Held*, that the plaintiffs had no interest in the land, and therefore were not entitled to compensation under the Act: *New River v. Midland Ry.* (1877), 37 L. T. 539. (No land taken.)

(9) A railway company cut off one access to a mill, substituting a deviated road with steep gradients. They diverted another access. They agreed with the owners that any claim for compensation for injury to their property should not be barred by reason of no part of the land being taken. The owners obtained compensation: *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. (No land taken.)

(10) A railway was constructed on land over which a right of shooting had been granted by an agreement not under seal. It was *held* that the owner of the shooting rights had not such an interest in land as to entitle him to compensation for the diminution in value of the shooting: *Bird v. Great Eastern Ry.* (1865), 34 L. J. C. P. 366. But a right to shoot over land and take away the game killed is a *profit-à-prendre* and an interest in land: *Webber v. Lee* (1882), 9 Q. B. D. 315. (No land taken.)

NOTE.—The grant to a person, his heirs and assigns, of free liberty, with servants or otherwise, to come into and upon lands and there to hawk, hunt, fish and fowl, is a grant of a licence of profit, and not a mere personal licence of pleasure, and is therefore a *profit-à-prendre* within the Prescription Act, 2 & 3 Will. IV. c. 71, s. 2: *Wickham v. Hawker* (1840), 7 M. & W. 63.

(11) The erection of an embankment by a railway company under their special Act interfered with the access to a sewer. The sewer had been constructed under a local Act on land part of which belonged to the railway company at the date of its construction, and part of which was subsequently purchased by them. No right of access to the sewer was given by the local Act; and as such access was not altogether prevented, but only rendered less easy, it was *held* that no compensation was payable by the railway company: *Birkenhead Corporation v. London and North-Western Ry.* (1885), 15 Q. B. D. 572. (No land taken.)

(12) In calculating the extent to which W.'s property, used as an hotel and public-house, had been prejudicially affected by the execution of certain works by a railway company, the arbitrator assessed the value of the premises as if there had been a restrictive covenant preventing the property being used as an hotel or public-house. In arriving at a further sum by way of compensation, the arbitrator did take into consideration the fact that for some time the premises had been used as an hotel and public-house as part of the evidence that such premises were suitable for use as an hotel or public-house, but he did not take into account the depreciation in the value of the licence or the loss of trade then being carried on, nor any element of compensation considered by him in determining the

first of the two sums awarded:—*Held*, that he had acted rightly: *Wadham v. North Eastern Ry.* (1885), 16 Q. B. D. 227. (No land taken.)

(13) Lessees occupied under a lease for years three back rooms on the first floor in a house in Great Tower Street. No right of way was demised with the rooms, but the mode of exit was by going downstairs to a passage on the ground floor and thence through the front hall of the house into the street. A railway company, in the execution of works authorised by their Acts, pulled down and took away the front part of the house, including the hall. It was *held* that the lessees were entitled to compensation: *Ford v. Metropolitan Ry.* (1886), 17 Q. B. D. 12. (No land taken.)

VI. The elements of injury which may be taken into consideration are set out in the following illustrations.

(a) Access to sea cut off (but see *post*, p. 345).

Illustrations.

(1) C. owned a plot of building ground, adjoining the foreshore. The B. Railway Co. purchased part of the foreshore from the Crown, and proposed to construct a railway which would cut off C.'s access to the sea:—*Held* that, although no part of C.'s land was taken, he was entitled to have compensation for the damage to his land, which had been injuriously affected. *Seem*, that the interruption of his right of access to the sea entitled him to compensation: *R. v. Rynd* (1863), 16 Ir. C. L. R. 29. (No land taken.)

(2) Reclamation works were executed on a foreshore. The owner of a tenement who was thereby deprived of right of access to the sea, was *held* entitled to maintain an action: *Attorney-General of Straits Settlements v. Wemyss* (1888), 13 App. Cas. 192. (No land taken.)

(b) Access to river cut off.

Illustrations.

A railway company under their Act constructed a railway between a wharf on the Humber and low-water mark. The wharf-owner was *held* entitled under the Act to have a new wharf constructed for him: *Bell v. Hull and Selby Ry.* (1840), 6 M. & W. 699 (No land taken.)

(2) Injury was done by the works of a railway company to the property of C. by cutting off the communication on one side to a ferry appurtenant to C.'s land:—*Held*, that the ferry, if attached to C.'s land, was a private right in respect of which compensation might be assessed: *In re Cooling and Great Northern Ry.* (1849), 6 Rail. Cas. 246. (No land taken.)

(3) A public right of navigating a tidal river was connected with an exclusive right of access to and from a particular wharf. It was *held* that this constituted a form of enjoyment of the land and of the river in connection with the land, in respect of which, if disturbed, an action would lie. *Per* Lord Selborne: "If the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would by the deprivation of this water frontage be injuriously affected": *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. pp. 662, 684. (No land taken.)

(4) A railway embankment was constructed along the foreshore of a tidal and navigable river. *Held* that under the French law of Lower Canada riparian owners had a right of action against the railway company: *North Shore Ry. v. Pion* (1889), 14 App. Cas. 612. (No land taken.)

(c) Access to house.

Illustrations.

(1) A railway company, in the exercise of statutory powers, lowered a public high road seven feet, leaving a cottage on the adjoining land on the edge of a precipice, and obliging the

owner to make use of a step ladder from the road in order to obtain access to his cottage. He was *held* entitled to compensation : *Moore v. Great Southern and Western Ry.* (1858), 10 Ir. C. L. R. 46. (No land taken.)

(2) A railway company, under statutory powers, raised a highway ten feet opposite a house, which was rendered damp thereby, and access to which was impeded. The owner of the house was *held* entitled to compensation : *Tuokey v. Great Southern and Western Ry.* (1859), 10 Ir. C. L. R. 98. (No land taken.)

(3) Acting under statutory powers, a railway made an obstruction and deviation in a highway running by certain houses, some of which were unfinished, with the result that that part of the highway running alongside the houses was no longer used as a thoroughfare. The houses became less suitable for shops, and their value was lessened, owing to the decrease in the number of persons who used the road :—*Held*, that the houses were “injuriously affected,” and that the lessee might recover compensation, the test in such cases being whether an action would have lain but for the statute under which the company acted, and, if it would, the lessee could recover compensation, including loss of prospective profits of the unfinished houses : *Chamberlain v. West End of London and Crystal Palace Ry.* (1863), 2 N. R. 182 ; approved in *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243 ; and in *Caledonian Ry. v. Walker's Trustees* (1882), 7 App. Cas. 259. (No land taken.)

(4) A right of way from one street to another was conveyed to a purchaser. A railway company made a line under one of the streets, and by altering its level cut off the access for horses and vehicles to and from the other street. The purchaser was *held* entitled to compensation : *Furness Ry. v. Cumberland Co-operative Building Society* (1884), 52 L. T. 144. (No land taken.)

(5) L. was lessee of a house. The lease defined the premises demised by metes and bounds, and did not include half of the street opposite to the house. The M. D. Railway Co. were empowered by an Act which incorporated the Lands Clauses Act, but not the Railway Clauses Act, to construct a subway. In the execution of this work they interfered with the surface of the street opposite L.'s house, and erected a hoarding ten feet high there and obstructed L.'s access to the street. It was *held* that L.'s remedy, if any, was by way of compensation under sect. 68 of the Lands Clauses Act, and not by way of an action for damages : *Landrock v. Metropolitan District Ry.* (1886), 3 T. L. R. 162. (No land taken.)

(6) Access to a public-house was interfered with by the closing of an old bridge, which diverted the traffic. Compensation was awarded to the owner : *Metropolitan Board of Works v. Howard* (1889), 5 T. L. R. 732. Lord Herschell said : “If a house were rendered less accessible to customers, that might diminish the value of the house for all purposes, although the evidence which was given with reference to the actual loss of trade and the decreased number of years' purchase it would fetch on sale ought not to have been admitted.” (No land taken.)

(d) Ancient lights.

Illustrations.

(1) A railway company, in the execution of the works authorised by their special Act, caused diminution in the access of light to E.'s premises, which were rendered less suitable for E.'s trade, and E. sustained damage in his trade ; but the value of property in the neighbourhood having increased in consequence of the execution of the works, the saleable value of E.'s interest in the premises was not diminished :—*Held*, that E. was entitled to compensation for the diminution of light as an injurious affecting of his estate in the premises : *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638. (No land taken.)

(2) The L. School Board, under the powers of the Elementary Education Act, 1870, purchased land adjoining houses belonging to C. and proceeded to build schools thereon, which schools would interfere with ancient lights in C.'s houses. C. filed a bill for an injunction to restrain the school board from building the schools :—*Held*, that a school

board taking lands under the Elementary Education Acts need not give notice to treat to the owners of easements over lands taken by them under these powers, but that compensation was to be given as for land injuriously affected, and that that proceeding was substituted for an action: *Clark v. London School Board* (1874), L. R. 9 Ch. 120 (no land taken); followed in *London School Board v. Smith* [1895] W. N. 37.

(3) Under an Act which incorporated the Lands Clauses Acts, artisans' dwellings were erected, some of which obstructed ancient lights belonging to an adjoining owner. It was *held* that he had no remedy by injunction, but was entitled to compensation: *Wigram v. Fryer* (1887), 36 Ch. D. 87; followed in *London School Board v. Smith* [1895] W. N. 37. (No land taken.)

(4) Buildings which contained ancient lights were pulled down, and new buildings were erected on the site. Some of the windows in the new buildings did not correspond in position to the old windows; others included the whole or the greater part of some of the old windows but were of larger area. A railway company under statutory powers built a warehouse which obstructed the lights of the new buildings. It was *held* that compensation was payable in respect of all the windows: *In re London, Tilbury and Southend Ry. and Trustees of Gower's Walk Schools* (1889), 24 Q. B. D. 326. (No land taken.)

(e) Annuities charged on land.

Illustration.

Annuities were charged on land under which the company had power to make a tunnel. Notice to treat was given, but the company subsequently made arrangements to pull down the buildings on the land. They were restrained from doing so until the amount due in respect of the annuities had been ascertained and paid or secured: *University Life Assurance Society v. Metropolitan Ry.* [1866] W. N. 167. (Land taken.)

(f) Damage to goods.

Illustration.

A house sustained structural damage by the execution of railway works, and goods in it were damaged. The owner was *held* entitled under sects. 6 and 16 of the Railways Clauses Act to compensation for injury to the goods as well as injury to the structure: *Knock v. Metropolitan Ry.* (1868), L. R. 4 C. P. 131. (No land taken.)

(g) Injury to ferry (see also *Cowes Council v. Southampton Council*, [1905] 2 K. B. 287.

Illustrations.

(1) "It was next objected that the evidence did not show this to be an ancient ferry, either by customary grant or prescription. The present plaintiff was proved to be in possession. It seems to me that it was not necessary to prove the copy of the court-roll; it was quite sufficient, to support this action, to prove that the plaintiff was in possession of the ferry; and it was shown that the ferry had existed for a long period of time": *per* Bayley, J., in *Peter v. Kendal* (1827), 6 B. & C. at p. 710; 30 R. R. 504. As to cutting off access to ferry, see *Cooling v. Great Northern Ry.*, *ante*, p. 337. (No land taken.)

(2) B. was the owner of a certain ancient and exclusive ferry over a navigable river. The defendant company, acting under statutory powers, constructed a bridge, with a footway thereto attached, about half a mile from the ferry. This bridge was unconnected with the ferry and did not obstruct the approaches to it. After the opening of the bridge (which was intended only for the use of persons going to or from a neighbouring railway station on the company's line) the business of the ferry fell off:—*Held*—(1) that the plaintiffs could not have maintained any action against the defendant company either in respect of

the railway bridge or in respect of the footbridge if they had been erected without the authority of an Act of Parliament, and that therefore the present action to recover the amount of compensation awarded to the plaintiffs did not lie; and (2), following the rule laid down in *Hammersmith Ry. v. Brand* (*ante*), that the damage in the present case having arisen wholly from the user of the railway and works after they had been constructed and opened for traffic, the plaintiffs were not entitled to compensation: *Hopkins v. Great Northern Ry.* (1877), 2 Q. B. D. 224. (No land taken.)

(h) Flooding of land.

Illustrations.

(1) Injury to land from occasional flooding caused by the construction of a reservoir under statutory powers was *held* a ground for compensation: *Ware v. Regent's Canal* (1858), 3 De G. & J. 212. (Land taken.)

(2) It was *held* in a Scotch case that the owner of land situate nearly a mile from a railway had a right to sue for damages for injury to the land by floods caused by the workings of the railway company: *Potter v. Hamilton and Strathaven Ry.* (1864), 3 Ct. Sess. Cas. (3rd series) 83. (No land taken.)

(3) By the Act 50 Geo. III. c. clxvi., the defendant corporation was authorised to improve and maintain the navigation of a river, making satisfaction to the persons interested in any lands through, in or upon which the navigation or other works were made. The corporation caused to be put down certain staunches, which, together with the natural growth of the weeds in the river and the accumulation of silt against the staunches, occasioned an overflow of the river and damage thereby to the plaintiff's land:—*Held*, that the defendants' powers and duties were all for the benefit of the navigation, and not for drainage purposes; that the works had been carried out in pursuance of the powers of the Act and without negligence; and that therefore the plaintiff had no right of action, but that his remedy, if any, was by way of compensation under the Act: *Cracknell v. Thetford Corporation* (1869), L. R. 4 C. P. 629. (No land taken.)

(k) Interruption of flow of water.

Illustrations.

(1) A waterworks company under their Act made alterations in a weir, thereby obstructing the working of a mill. The mill-owner was *held* entitled to compensation: *R. v. Nottingham Old Waterworks* (1837), 6 A. & E. 355; 45 R. R. 484.

(2) The Corporation of Bradford diverted a stream for waterworks purposes under an Act incorporating the Waterworks Clauses Act. It was *held* that the 85th section of the Lands Clauses Act was applicable, in the same way as if land had been taken. "If you take the stream, you must pay the whole price of it. . . . When you have injuriously affected the stream, compensation in damages must be made in accordance with the ordinary mode": *per* Romilly, M.R., *Ferrand v. Bradford Corporation* (1856), 21 Beav. 412, 419; followed in *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99.

(3) A railway company by their works intercepted a stream which flowed into a tanyard. The owner of the tanyard was *held* entitled to compensation: *Mortimer v. South Wales Ry.* (1859), 1 El. & El. 375.

(4) A waterworks company, under statutory powers, diverted part of the water which flowed down a brook. The tenant for life of certain water meadows through which the brook ran claimed that notice to treat for the purchase of her interest in the brook ought

to have been given. It was *held* that she could only obtain compensation as for land injuriously affected: *Bush v. Trowbridge Waterworks* (1875), L. R. 10 Ch. 459; distinguished in *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99.

(5) Messrs. P., the claimants, were the owners of mills upon the river Ise. A waterworks company had power to take a certain amount of water from two brooks which fell into another stream, a tributary of the Ise. Fourteen-fifteenths of the water, after being used for drainage purposes at K., again fell into the Ise above the mills. The arbitrators found that if they were to deal with the question on the basis of the water originally taken out, the damage was 925*l.*; but if it were treated on the basis of the actual present diminution of the stream, 55*l.* was enough:—*Held*, that if the claimants had been riparian owners on either of the brooks, or the stream formed by their junction, then they could have proceeded on the principle of purchase and claimed the larger amount, but they were not in that position. The claimants had no direct interest in the brooks, but in the volume of the river Ise, and a right to prevent its flow being affected: *Page v. Kettering Waterworks* (1892), 8 T. L. R. 228.

(l) Towage rights.

Illustration.

Under a special provision in a special Act compensation was given for injury to an exclusive right of towing barges, caused by the making of a cut, whereby the barges were enabled to avoid the towing path over which the right extended: *R. v. Thames and Isis Navigation* (1836), 5 A. & E. 804; 44 R. R. 591. (No land taken.)

(m) Loss of business profits. This subject is dealt with under sect. 63, at p. 305, *ante*.

(n) Obstruction to navigation.

Illustration.

By Canadian law, if the navigation of a river is obstructed by the erection of a bridge, an action by a riparian owner will not lie without proof of special damage: *Bell v. Quebec Corporation* (1879), 5 App. Cas. 84. (No land taken.)

(o) Obstruction to highway.

When an obstruction is caused in a highway by the execution of works, neither damages in an action nor compensation can be recovered by the owner or occupier of premises to which the highway gives access unless he has suffered some damage or inconvenience peculiar to himself, and which is the direct result of the obstruction.

Illustrations.

(1) A. was specially damaged by the obstruction of a highway:—*Held*, that he could maintain an action for damages: *Maynell v. Saltmarsh* (1665), 1 Keb. 847. (No land taken.)

(2) No action lies for a public nuisance unless there be special damage. Stopping up a common highway is a public nuisance: and the prevention of customers from coming to a colliery, whereby the benefit of the colliery was lost and coals raised losing their value, is such special damage as will entitle one to bring his action for a public nuisance: *Iceson v. Moore* (1697), 1 Ld. Raym. 486 (no land taken); approved in *Winterbottom v. Derby (Lord)*, *post* p. 342.

(3) The plaintiff declared against defendants in case for shutting, and keeping shut a gate across a public highway, thereby compelling the plaintiff, who was driving three laden asses, to go back and perform his journey by a very circuitous route :—*Held*, that the plaintiff had suffered a particular damage which entitled him to maintain the action : *Greasly v. Codling* (1824), 2 Bing. 263. (No land taken.)

(4) A count stating plaintiff to be the reversioner of premises and abutting on a public navigable river, and that the plaintiff and others were accustomed of right to have free navigation on the river for boats, and the plaintiff was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the premises from the river and unload the boats on the premises, without obstruction, but that the defendant fixed barges, planks, &c., in the part of the river near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises from the river, and hindered the unloading of boats on the premises and by means thereof the plaintiff was injured in his reversionary interest, is *bad* in arrest of judgment, as not showing damage to the reversionary interest : *Dobson v. Blackmore* (1847), 9 Q. B. 991. (No land taken.)

(5) In an action for obstructing a public highway, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions when passing along it, and being compelled, in common with everyone else who attempted to use it, either to pursue his journey by a less direct road or to remove the obstruction :—*Held*, that he was not entitled to maintain the action : *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316. “The rule of law on the subject, which is well laid down in the case of *Ricket v. Metropolitan Ry.* (1867), 5 B. & S. at p. 156, is, that in order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by himself over and above that suffered by all the Queen’s subjects. . . . The leading case is that of *Ireson v. Moore*” (*ante*) : *per Kelly, C.B.*, at p. 320, *ib.* (No land taken.)

(6) B. owned a house fronting a highway fifty feet wide. The M. Railway Co., in the exercise of their statutory powers, narrowed the road to thirty-three feet, and by the construction of an embankment obstructed the access of light and air to B.’s house and reduced its selling or letting value :—*Held*, that B. was entitled to compensation under sect. 68 of the Lands Clauses Act and sects. 6 and 16 of the Railways Clauses Act for permanent injury to his estate in the premises : *Beckett v. Midland Ry.* (1867), L. R. 3 C. P. 82 (no land taken) ; approved in *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243.

(7) Where a person suffers a particular injury from the obstruction of a public way :—*Held*, that the appropriate remedy is by injunction, and that the Attorney-General need not be made a party : *Cook v. Bath Corporation* (1868), L. R. 6 Eq. 177. (No land taken.)

(8) Access from a shop to a highway was obstructed by an unreasonable user of the highway for building purposes. The owner of the shop was *held* entitled to recover damages for loss of custom : *Fritz v. Hobson* (1880), 14 Ch. D. 542. (No land taken.)

(9) If promoters of an undertaking acting *ultra vires* commit an illegal act which tends to the public injury (such as interference with a highway or a navigable stream) the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act, although no evidence of actual injury is given : *Att.-Gen. v. Shrewsbury Bridge* (1882), 21 Ch. D. 752 ; followed in *Att.-Gen. v. London and North-Western Ry.*, [1900] 1 Q. B. 78. (No land taken.)

(p) Obstruction of private road.

Illustrations.

(1) A railway company obstructed a private right of way, but no special damage was alleged. It was *held* that, in the absence of special damage, the common law right of action was taken away by the Railways Clauses Act, 1845 : *Watkins v. Great Northern Ry.* (1851), 16 Q. B. 961. (No land taken.)

(2) The owner of property was *held* entitled to compensation for injury done thereto by cutting off access to the property by means of an embankment raised near it : *R. v. Bristol and Exeter Ry.*, Chitty's Stat., vol. ii, 3rd ed., p. 1164.

(q) Alteration of level of road.

Illustrations.

(1) A road was lowered under the provisions of a railway Act, whereby land adjoining the road was injured, access thereto was impeded, and additional fences were rendered necessary. The owner of the land was *held* entitled to compensation under the Act : *R. v. Eastern Counties Ry.* (1841) 2 Q. B. 347 ; 57 R. R. 689. (No land taken.)

(2) Upon an injunction to restrain the defendants from raising a footway, under powers contained in local Acts which incorporated the Lands Clauses Act, in front of plaintiff's house, and thereby preventing access to a warehouse, and from otherwise damaging their property, it having been established that the defendants were empowered under their Acts to alter the footway, and also that the plaintiffs had sustained and would sustain injury thereby, an injunction was refused, but it was referred to chambers to ascertain and certify the amount of injury, and what would be a proper sum to be awarded by way of damages in respect of such injury : *Wedmore v. Bristol Corporation* (1862), 7 L. T. 459. (No land taken.)

(3) "The principle is that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street either be lifted or sunk by the railway twenty feet above or below the level of that street, the house would be injuriously affected, both for pleasure and profit, by reason of the change in the access to and from the house ; or if a house fronting to a street of that description should be turned round so as to front to a dark back alley, the house would be injuriously affected—the site of the house would be altered for the worse. . . . But if, instead of lifting or sinking the house or turning its front from a grand street to a back alley, the street is lifted or sunk or changed in its character, the relation of the house to its highway is affected precisely to the same degree as it would be by altering the relative position of the house itself in respect of that highway" : *per* Eile, C.J., in *Ricket v. Metropolitan Ry.* (1865), 34 L. J. Q. B. at p. 261 ; affirmed (1867), L. R. 2 H. L. 175 (no land taken). This case has been commented on and distinguished in a large number of cases. See *ante*, p. 335.

(4) A local board raised the level of a street opposite a house so as to permanently block up a portion of the doorway and render access from the street dangerous. The owner of the house was *held* entitled to compensation under sect. 144 of the Public Health Act, 1848 (repealed by 37 & 38 Vict. c. 55), though he had made default in doing the works himself : *R. v. Wallasey Local Board* (1869), L. R. 4 Q. B. 351. (No land taken.)

(r) Construction of sewer.

Illustrations.

(1) The commissioners of sewers constructed a sewer under land at Kensington, but made no compensation to the owner, the land being in possession of a tenant. The owner subsequently recovered compensation from the Metropolitan Board of Works, to whom the property and liabilities of the commissioners had been transferred : *In re Pettitward and Metropolitan Board of Works* (1865), 19 C. B. N. S. 489.

(2) A local board, under the powers of the Public Health Act, 1875, gave notice to the owners of two houses of their intention to carry a sewer across their pleasure grounds, the bottom of the sewer being only about two feet below the surface, and a permanent embankment about five feet high being made. A motion to restrain the execution of the works failed, the matter being one for compensation : *Roderick v. Aston Local Board* (1877), 5 Ch. D. 328.

(s) Injury by damp.

Illustration.

The N. Railway Co. raised the surface of their land, abutting on H.'s house, by placing earth and rubbish thereon, in consequence of which rain-water falling on the company's land made its way through their wall into H.'s house and caused injury :—*Held*, that H. could maintain an action against the company : *Hurdman v. North-Eastern Ry.* (1878), 3 C. P. D. 168. "The question is—Are the defendants . . . liable to the plaintiff? and we are of opinion that they are. The heap or mound on the defendants' land must, in our opinion, be considered as an artificial work. Every occupier of land is entitled to the reasonable enjoyment thereof. This is a natural right of property, and it is well established that an occupier of land may protect himself by action against anyone who allows any filth or any other noxious thing produced by him on his own land to interfere with this enjoyment" : *per* Cotton, L.J., at p. 173, *ib.* (No land taken.)

(t) Drifting timber.

Illustration.

Declaration that the plaintiff was possessed of a public-house abutting upon a navigable river, and that the defendant wrongfully and maliciously placed upon the said river, and kept there for a long time, certain timbers so as to drift opposite to the plaintiff's house, whereby the access thereto was obstructed and divers persons who would otherwise have come to the house and taken refreshments there were prevented from so doing. Plea, not guilty :—*Held*, that the declaration disclosed a private injury to the plaintiff : *Rose v. Groves* (1843), 5 Man. & G. 613. (No land taken.)

(u) Noise of board school.

Illustration.

P. was the lessee of land. The L. School Board served a notice to treat with respect to a part of this land. On another part of the land P. had erected some houses, and at the hearing before the under-sheriff and a jury gave evidence of the depreciation of these houses owing to the noise caused by the children at the school built upon the portion taken. The jury assessed the damage at 1,000*l.* :—*Held*, that the jury had rightly been left to consider damages under this head, and that the Court should not interfere with the verdict : *R. v. Pearce, Ex parte London School Board* (1898), 78 L. T. 681. (No land taken.)

(v) Improvements under invalid lease.

Illustration.

A railway company required certain property which was in the occupation of C., and gave him notice to treat. C., who held by virtue of two indentures of lease, claimed compensation in respect of the two leases, one of which was for twenty-one years and the other for eighty years. He also claimed compensation in respect of loss of trade: 1,500*l.* was awarded for the leases and 700*l.* for loss of trade. These sums were paid into court by the company. The leases turned out to be invalid:—*Held*, that C. was entitled only to so much of the 1,500*l.* as represented the value of improvements which he had effected on the faith of the leases being valid: *Ex parte Cooper, In re North London Ry.* (1865), 34 L. J. Ch. 373. (Land taken.)

(w) Breach of restrictive covenant.

Illustration.

The owners of a recreation ground conveyed building land to various grantees subject to covenants not to erect any building thereon other than private dwelling-houses. A railway company, who had purchased land from the grantees with notice of the covenants, erected an embankment on the land. The owners of the recreation ground recovered compensation, on the ground that the property was injuriously affected: *Long Eaton Recreation Grounds, Ltd. v. Midland Ry.*, [1902] 2 K. B. 574. (No land taken.)

VII. The elements of injury which may not be taken into consideration are set out in the following illustrations:—

(a) Access to sea.

Illustration.

A railway company raised an embankment which cut off access to the sea from a dwelling-house. It was *held* that the injury complained of was not a subject of compensation: *Falls v. Belfast and Ballymena Ry.* (1849), 12 Ir. L. R. 233. *See*, however, *R. v. Rynd* (1863), 16 Ir. C. L. R. 29, *ante*, p. 337. (No land taken.)

(b) Grubbing up plants in a garden.

Illustration.

A seedsman at Covent Garden had a garden at Wandsworth where he tried seeds, afterwards giving a warranty with them when sold, and obtaining a higher price in consequence. A local board constructing a sewer grubbed up the plants, and in consequence no warranty could be given. The damage was *held* too remote: *In Re Clarke and Wandsworth District Board* (1868), 17 L. T. 549.

(c) Lateral support to a sewer.

Illustration.

By the construction of the Metropolitan Railway a sewer, which was the property of the Metropolitan Board of Works and was less than twenty years old, was deprived of lateral support and burst. It was *held* that the Board had acquired no right of lateral

support for their sewer, and were not entitled to compensation: *Metropolitan Board of Works v. Metropolitan Ry.* (1869), L. R. 4 C. P. 192. (No land taken.)

(d) Tithes.

Illustrations.

(1) Under an act for improving a navigation, titheable land was taken and covered with water. It was *held* that the tithe-owner was not entitled to compensation, inasmuch as he had no right to insist upon the land being used in such a manner as to produce tithe: *R. v. Nene Outfall Commissioners* (1829), 9 B. & C. 875. (Land taken.)

(2) By 37 Hen. VIII. c. 12, the inhabitants of certain parishes in the City of London are bound to pay tithe at the rate of 2s. 9d. in the £ on their rent. By 2 & 3 Vict. c. xcv., when houses were taken for the purposes of the railway to B. the tithes of new houses to be built "shall be equal to the tithes payable for the houses quitted . . . or annual sums of money equal to the loss in tithes which the rectors may sustain by the taking down of such houses, shall be paid to the said rectors," &c.:—*Held*, that the object of the Act was only indemnity to the clergy; that therefore the clergy were entitled to receive only what they would have received if the railway company had never interfered with the premises; and that the company was liable to pay in respect of houses removed, when no others had been built in their places, such sums as were actually paid to the rector: *London and Blackwall Ry. v. Letts* (1851), 3 H. L. Cas. 470. (Land taken.)

(3) In the City of London tithes are regulated by a special statute, 37 Hen. VIII. c. 12 (*see* last illustration):—*Held*, in a case where a lessee agreed to pay a yearly reserve rent of 102l. 10s. and to lay out 2,000l. in building a house upon the land, that the tithes were to be computed, not merely on the rent reserved by the lease, but on the full annual value of the premises to let as improved by the expenditure of 2,000l.: *Virian v. Cochrane* (1855), 25 L. J. Ch. 553. (Land taken.)

(4) A railway company took property subject to tithes on condition that they continued to pay them to the tithe-owner according to the last annual assessment or purchased them by payment of compensation. It was *held* that the last annual assessment was not to be taken as the basis for estimating such compensation: *Esdaile v. Metropolitan and District Rys.* (1881), 46 J. P. 103. (Land taken.)

(5) E., a lay impropricator of tithes of a parish in the City of London, brought an action to recover tithes in respect of certain houses under 37 Hen. VIII. c. 12, which provides for the payment by the inhabitants of the City of tithes in respect of their houses at certain rates. No tithes had ever been paid in respect of these houses:—*Held*—(1) that these tithes were not a render of tithes in kind within the meaning of the Tithe Act, 1832 (2 & 3 Will. IV. c. 100); (2) that these tithes were "annuities or periodical sums of money charged upon land," and that the claim was barred by the Statute of Limitations: *Payne v. Esdaile* (1888), 13 App. Cas. 613. (Land taken.)

NOTE.—The sum payable in lieu of tithes is not, by the Tithe Commutation Act, 1836, made a charge on the inheritance: *Bailey v. Badham* (1885), 30 Ch. D. 84. (Land taken.)

(e) Interception of and abstraction of water from underground stream.

Illustration.

Works authorised by a local Act which incorporated the Waterworks Clauses Act, 1847, intercepted water from percolating underground into a well, and also abstracted water therefrom. There being no right of action on either ground apart from the statute, it was *held* that no compensation was payable. "The Legislature, if it intends to give a right

of compensation to parties who may sustain an injury for which no action would have lain, must say so in the most express terms": *per* Cockburn, C.J., in *New River v. Johnson* (1860), 2 El. & El. 435. (No land taken.)

(f) Removal of disused underground water-pipes.

Illustration.

The defendants, under statutory powers, took land under which the plaintiffs' water-pipes were laid. The pipes were buried beneath the defendants' embankment, and ceased to be used. Afterwards, in making a tunnel, the defendants took up the pipes, whereupon the plaintiffs claimed compensation in respect of them:—*Held*, that the plaintiffs had no interest in the land, and therefore were not entitled to compensation under sect. 68: *New River v. Midland Ry.* (1877), 36 L. T. 539. (No land taken.)

(g) Damage which might have been foreseen in settling a prior claim.

Illustrations.

(1) The plaintiffs were the owners and occupiers of a coal-mine which, together with the surface above, belonged to the same person. A railway company (the predecessors of the defendant company), acting under their statutory powers, took the surface land and made their railway over it. In so doing more than twenty feet in thickness of the surface earth over the plaintiffs' mine was taken away. The soil was clay, impervious to water; in removing it a porous rock was reached. The soil was likewise cut away along the length of their line to a lower district, through which flowed a brook. The railway was carried over the brook by means of a flat bridge. The line of railway sloped downwards from the bridge to the part over the plaintiffs' mine. The bridge was so built as to allow the ordinary water to pass away under it, but in time of flood it became an obstruction. The company were bound to make and maintain sufficient drains. At the time of the construction of the railway the mine was not worked within forty yards of it, and drains were made at the side of the railway sufficient to carry off the water. The plaintiffs afterwards gave defendants notice of their intention to work the mine. The defendants having declined to purchase the mine, the plaintiffs proceeded to work, when, as the natural result of proper and lawful working, the railway sank, and continued to do so from time to time. The defendants threw materials of a porous character on the sunken parts, but did not repair or puddle the drains. In 1860 a flood happened, and the water (part of which would have passed away but for the bridge) flowed along the railway, and owing to the high ground between the brook and the surface over the mine having been taken away, it reached that spot, and, with other water, penetrated into the mines:—*Held*, that the plaintiffs were entitled to damages by reason of the defendants' wrongful conduct in not making and maintaining outlets for the flood water or draining it off the plaintiffs' land, or covering the surface with clay, or maintaining adequate drains for carrying off flood and other water; but *held* that the claim was not one enforceable under the compensation clauses: *Bagnall v. London and North-Western Ry.* (1861), 7 H. & N. 423. (Land taken.)

(2) A railway company having by agreement acquired certain land of the plaintiff for the purpose of constructing a tunnel, the parties referred to arbitration the amount to be paid for the land and the amount of compensation for the damage sustained through the construction of the tunnel:—*Held*, that damage which subsequently accrued from subsidence and vibration, and might have been foreseen, was matter which might and ought to have been taken into consideration by the arbitrator and assessed once for all: *Croft v. London and North-Western Ry.* (1863), 32 L. J. Q. B. 113. (No land taken.)

(3) On October 23rd, 1891, a railway company served notice to treat upon G., the owner in fee, as to certain land. On January 12th, 1892, G. sent in his claim, with particulars of his interest. On October 14th, 1892, an agreement was made between G. and the company with respect to the amount of compensation, and on November 27th, 1894, a conveyance was executed by G. On June 14th, 1892, however, a lease had been granted by G. to one M. of certain building land not included in the notice to treat, and M. erected houses on it. M. had no knowledge of the notice to treat, nor had the company any notice of the lease when the agreement with G. was made or when the conveyance was executed. After the date of the conveyance, works were carried out by the company which necessitated the lowering of the street on which M.'s land abutted, and thereby it was injuriously affected. M. claimed compensation under sect. 68, and an award of 371*l.* was made in his favour :—*Held* that, M.'s interest as lessee having been created at a date subsequent to that of the notice to treat, he could not recover compensation from the railway company : *Mercer v. Liverpool, St. Helens and South Lancashire Ry.* (1904), 73 L. J. K. B. 960. “But the case of *Croft v. London and North-Western Ry.* appears to me to show that the landowner, after assessment under the notice to treat, is precluded from claiming further compensation in respect of any matter which might have been brought forward at the time of the assessment, whether it was so brought forward in fact or not. After payment of the assessed compensation the right of the promoters to execute the works (with the possible exception already stated) is absolute, and, being a legal right in the nature of an easement, prevails against legal rights created by the landowner subsequently to the assessment and payment of compensation. This being so, it is difficult to see why the right of the promoters should not prevail against a legal title derived from the landlord subsequently to the notice to treat, but before the assessment of compensation. The landowner cannot escape from the objections imposed on him by the notice to treat ; and one of these is an obligation to bring forward and have determined all claims in respect of damage to lands of his arising from the execution of the proposed works. If, as the cases already referred to show, he can only deal with the land which he is required to give up subject to the obligation imposed by the notice to treat, I do not see why he should be permitted to disregard those obligations when dealing with land which he is not required to give up, but which may be damaged by the execution of the works” : *per* Stirling, L.J., in same case in C. A. (72 L. J. K. B.) at p. 134. (No land taken.)

(4) Injury to trade by diversion of traffic.

Illustration.

The L. Corporation, in the exercise of statutory powers, lowered the level of the roadway of the street in which B.'s house was situate, and in excess of their powers interfered with B.'s cellar :—*Held*, that B. was entitled to be compensated for the consequences of the unauthorised interference with the cellar, but not for any indirect injury to his trade caused by the diversion of traffic occasioned by the exercise of the statutory powers : *Bigg v. London Corporation* (1873), L. R. 15 Eq. 376. (No land taken.)

See also cases collected under sect. 63 (“Elements of value which may not be taken into consideration : (12) Temporary obstruction to business”), p. 305, *ante*.

(5) Injury to licensee for sale of refreshments in theatre by taking theatre.

Illustration.

By an agreement the plaintiff obtained the exclusive right to sell refreshments in a theatre, and to supply programmes, cloak-rooms, and other accommodation, and also the sole right to advertise and let spaces for advertisements in the bars, cloak-rooms, &c. The theatre having been taken under statutory powers, the plaintiff claimed compensation :—

Held, that the agreement did not create or confer an estate or interest within the meaning of sect. 68 of the Lands Clauses Act so as to entitle the plaintiff to compensation : *Warr v. London County Council*, [1904] 1 K. B. 713. (No land taken.)

(*l*) Promoters cannot, unless authorised so to do under the express words of their Act of Parliament, give evidence of the increased value to the owner of the lands not taken by the execution of the undertaking so as to reduce his claim for compensation for damage by severance or injuriously affecting. This is the principle of betterment.

NOTE.—The subject of betterment is also dealt with in Appendix B. (*post*), which contains the Report of the Select Committee of the House of Lords in August, 1894, on Town Improvements (Betterment), and sects. 6 and 22 of the Manchester Corporation Act, 1894 (57 & 58 Vict. c. ccix.), and sects. 4 and 36 of the London County Council (Tower Bridge South Approach) Act, 1895 (58 & 59 Vict. c. cxxx.). These sections are printed as specimens of the provisions which local authorities are able to get inserted in their improvement acts.

Illustrations.

(1) "I doubt whether, in a case of compensation for injury to land, a company can claim a set-off by reason of the land being subsequently benefited": *per* Wilde, B., in *Senior v. Metropolitan Ry.* (1863), 2 H. & C. 258 at p. 269. (No land taken.)

(2) Works executed by a railway company under their Act occasioned a diminution of light to a warehouse. The sale value of the house was not diminished, because property in the neighbourhood had increased in value. The lessee recovered compensation in consequence of the warehouse being injuriously affected by the injury to the lights, it being no answer that owing to accidental circumstances the saleable value of the premises was not diminished : *Engle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638. (No land taken.)

(3) Land was compulsorily taken for a railway. It was *held* under the Victorian Lands Compensation Statute, 1869, No. 344, s. 35, that enhancement in value of the owner's adjoining lands might be set off against compensation for damage thereto, but not against compensation for the land taken : *Harding v. Board of Land and Works* (1886), 11 App. Cas. 208. (Land taken.)

VIII. Claimant's remedies for obtaining compensation.

(a) No action lies when compensation is recoverable under this Act.

Illustrations.

(1) Trustees under a turnpike Act had power to enter upon land and remove buildings "making or tendering satisfaction." They were *held* not obliged to make or tender satisfaction before entering upon the land and pulling down the buildings : *Lister v. Lobley* (1837), 7 A. & E. 124.

(2) A railway company raised the level of a brook, thereby flooding a coal-mine. The mine-owner obtained a *mandamus* for a jury to ascertain damages, though the company alleged that they had restored the brook to its former level, and that the mine had been flooded before it was raised : *R. v. North Midland Ry.* (1840), 2 Rail. Cas. 1.

(3) A railway company constructed a tunnel, and thereby diverted underground springs from flowing to a pump:—It was *held* that they were not liable in an action for doing so: *Galgay v. Great Southern and Western Ry.* (1854), 4 Ir. C. L. R. 456. But *quære* whether compensation could have been claimed in this case: see *R. v. Metropolitan Board of Works* (1863), 3 B. & S. 710; *sub nom. Stainton v. Woolrych*, *ante*, p. 331.

(4) An action was brought against a railway company for diverting a watercourse. Their Act incorporated the Lands Clauses Act and the Railways Clauses Act:—It was *held* that the plaintiff could only obtain compensation under the Act: *Little v. Dublin and Drogheda Ry.* (1857), 7 Ir. C. L. R. 82.

(5) The owner of a wharf on the Thames had a right of access to the river and of loading and unloading barges at the wharf. In the construction of the Thames Embankment the river in front of the wharf was filled up. It was *held* that the Metropolitan Board of Works could not be restrained from filling up the river until they had made a deposit and entered into a bond under sect. 84 of the Lands Clauses Act, as they were only injuriously affecting the rights of the wharf-owner, and not acquiring from him any easement or interest in land: *Macey v. Metropolitan Board of Works* (1864), 33 L. J. Ch. 377; approved in the next case, *post*.

(6) Sect. 20 of the Elementary Education Act, 1870, incorporates the Lands Clauses Act, 1845. Thus, where the School Board for London built so as to obstruct ancient lights, the owner of the lights could only obtain compensation under sect. 68 of the Lands Clauses Act, and a bill for an injunction failed: *Clark v. London School Board* (1874), L. R. 9 Ch. 120; followed in *London School Board v. Smith* [1895] W. N. 37.

(7) Under a special Act which incorporated the Lands Clauses Act, 1845, the Railway Clearing Committee had power to erect buildings on land in Bedford Street. A motion to restrain them from obstructing the ancient lights of a house opposite their building was dismissed, the remedy against them being under sect. 68 of the Lands Clauses Act: *Bedford (Duke) v. Dawson* (1875), L. R. 20 Eq. 353.

(8) A railway company, under their statutory powers, erected buildings which obstructed ancient lights. It was *held* that the owners of the lights had no remedy by way of injunction, but could only proceed for compensation: *French v. London, Tilbury and Southend Ry.* (1886), 2 T. L. R. 395.

(9) A railway company being about to erect buildings on such a site and of such dimensions as would darken or obstruct the plaintiffs' lights to some extent, application was made for an injunction to restrain the defendants:—*Held*, that the acts of the company being within their statutory powers, the plaintiff's remedy was that conferred by sect. 68 of the Lands Clauses Act: *Courage v. South-Eastern Ry.* (1902), 19 T. L. R. 61.

(10) A railway Act provided that all rights of way over or along the portions of roads, &c., which should under the provisions of the Act be stopped up, were to be thereby extinguished. Contractors employed by the defendant railway laid down a line which passed along the plaintiff's occupation road, and ran trains thereon for the purpose of carrying plant and materials for construction of the lines authorised by the above Act. Upon motion for an injunction:—*Held*, that the plaintiff was not entitled to an injunction, but that his remedy was by compensation under sect. 68, on the ground that his property had been injuriously affected: *Barnard v. Great Western Ry.* (1902), 86 L. T. 798.

(b) But an action may be maintained where compensation cannot be claimed, except in cases where the Act which causes the injury is authorised by statute.

Illustrations.

(1) A railway company obstructed a public highway without previously constructing another road, as required by their Act. A livery-stable keeper who suffered special damage obtained an injunction restraining the company from continuing to obstruct the highway, and it was *held* unnecessary to make the Attorney-General a party to the suit: *Spencer v. London and Birmingham Ry.* (1836), 1 Rail. Cas. 159 ; 42 R. R. 159.

(2) A private road was obstructed by a railway contractor depositing clay on it. The owner of a wharf which communicated by the private road with a public highway obtained an injunction against the railway company: *Semple v. London and Birmingham Ry.* (1838), 1 Rail. Cas. 480.

(3) In the case of damage to a party whose lands are not entered upon but are injuriously affected by the exercise of the powers of a railway company upon their own lands or upon the lands of another person, and for which damage compensation is required to be made by sect. 6 of the Railways Clauses Act, the company may execute the works which occasion the damage before the amount of compensation for the same has been ascertained, paid or deposited: *Hutton v. London and South-Western Ry.* (1849), 7 Hare, 259.

(4) The Metropolitan Board of Works constructed a sewer without taking any steps under the Lands Clauses Act. Motions for injunctions to restrain them failed, having regard to the wide powers conferred by the Metropolis Local Management Act, 1855: *North London Ry. v. Metropolitan Board of Works* (1859), 1 Johns. 405.

(5) In the course of the construction of the Thames Embankment the Temple Pier was altered and diverted. It was *held* that the Metropolitan Board of Works were not bound to make or secure compensation to the pier-owners before interfering with the pier: *Temple Pier v. Metropolitan Board of Works* (1865), 34 L. J. Ch. 262.

(6) The appellant corporation, under their statutory powers, altered the gradient of a street and thereby seriously interfered with the access to the respondent's house. The Act under which the appellants acted made no provision for compensation in respect of consequential injury:—*Held*, that the respondent could not maintain an action against the corporation in respect of such injury: *East Freemantle Corporation v. Annois* (1902), 71 L. J. P. C. 39.

(c) The right to compensation must be shown to arise under some statute; and where there is such a right the claimant has no other remedy.

Illustrations.

(1) A railway company, having purchased a lease, gave notice to the reversioner to treat in fee simple. He filed a bill to restrain them on the ground that they were not authorised to take more than a portion of the land; but an injunction was refused, as a jury would have no power to assess the value of land which the company was not authorised to take: *Mouchet v. Great Western Ry.* (1838), 1 Rail. Cas. 567.

(2) Landowners who had received notice to treat from a railway company sent in particulars of their claim. Negotiations proving fruitless, the company went into possession under sect. 85 of the Lands Clauses Act. The landowners then abandoned their claim, and required the company to summon a jury to assess compensation, which the company refused to do. A claim by the landowners for a declaration that the company were bound to complete the purchase according to the original notice failed, on the ground that the owners had their remedy under sect. 68: *Adams v. London and Blackwall Ry.* (1850), 2 Mac. & G. 118.

(3) A lessee of land not taken by a railway company claimed compensation for dust and dirt caused by the works of the company ; for the temporary diversion of a footpath which passed along the claimant's land ; and for the stoppage of a lane along which he claimed a right of way to the back of his premises. The company filed a bill and obtained an injunction restraining further proceedings under the notice :—*Held*, that the claimant was entitled to proceed under the notice, and to have the amount of compensation assessed by a jury : *East and West India Docks v. Gattke* (1850), 3 Mac. & G. 155. "After the compensation jury shall have decided that the claimant has sustained a damage for which he was entitled to recover compensation, the claimant has to enforce judgment. Formerly the proceeding for that purpose was by *mandamus*, and if the jury had no jurisdiction to decide upon the right, it follows that the question of right might be raised by a return to the *mandamus* ; but since the decisions in *Corrigan v. London and Blackwall Ry.* (1843), 5 Man. & G. 219, and *Williams v. Jones* (1845), 13 M. & W. 628, it seems that the remedy of the claimant is by action on the judgment ; and the pleadings in *Corrigan's Case* in such an action show that *the right may be wholly disputed*, supposing, as before stated, a compensation jury had no jurisdiction to decide the question" : *per* Lord Truro, C., at p. 170, *ib.*

(4) Notice under sect. 68 of the Lands Clauses Act was served on a railway company claiming compensation for damage done to a farm. The railway had been completed and used for some time. It was *held* that the claimant ought not to be restrained from proceeding under the notice : *South Staffordshire Ry. v. Hall* (1851), 1 Sim. (N.S.) 373.

(5) A coffer-dam erected under statutory powers temporarily prevented ships from approaching warehouses adjoining a harbour. The Court refused to restrain the lessor of a warehouse, who claimed compensation, from proceeding under the Lands Clauses Acts : *Sutton Harbour v. Hitchins* (1851), 1 De G. M. & G. 161.

(6) A railway company took possession of land under their compulsory powers, and remained in possession after the period prescribed for the exercise of those powers. No compensation was assessed and the land was not conveyed to them. It was *held* that the landowner could not maintain ejectment, but must take proceedings to recover compensation : *Doe d. Armistead v. North Staffordshire Ry.* (1851), 20 L. J. Q. B. 249.

(7) An arbitrator under sect. 68 of the Lands Clauses Act made an award on a collateral matter (the improper construction of a wall) which affected the claim for compensation. It was *held* that he only had jurisdiction to determine the amount of damage : *Byles v. Ipswich Dock Commissioners* (1855), 11 Ex. 464.

(8) A special Act incorporated the Lands Clauses Act, 1845, "except so much as relates exclusively to the purchase and taking of land by compulsion." It was *held* that the 68th section was not excepted. The Court said : "We consider it to be an universal rule applicable to this class of statutes, that statutory compensation is given only for acts authorised by the statute, in effect taking away the right of action of the person injured" : *Broadbent v. Imperial Gas Light Co.* (1857), 7 De G. M. & G. 436.

(9) Money had been paid into court by a railway company in respect of land taken by them. It was *held* that, if a claimant had a less interest than he claimed, the Court would ascertain the value of his actual interest in the money, a jury or an arbitrator under the Lands Clauses Act having no jurisdiction to determine a question of title : *Brandon v. Brandon* (1864), 2 Dr. & Sm. 305.

(10) A railway company entered on land under sect. 85 of the Lands Clauses Act, but no compensation was claimed, paid or tendered. It was *held* that the owner had not lost his right to proceed under sect. 68 : *R. v. Metropolitan Ry.* (1865), 13 L. T. 444.

(11) By the London City Improvement Act (10 & 11 Vict. c. cclxxx.) the Lands Clauses Act was incorporated, except where not expressly varied ; it provided that "so

much of the Lands Clauses Consolidation Act as relates to the purchase of land otherwise than by agreement" was not to be incorporated in that Act. All the provisions of the City Improvement Act, except "the part with respect to the purchase and taking of lands otherwise than by agreement," were incorporated in the Holborn Valley Improvement Act (27 & 28 Vict. c. lxi.), except so far as those provisions had been repealed, altered or varied by or were inconsistent with that Act :—*Held*, that the Lands Clauses Act was incorporated with both Acts, except those sections (16 to 68) which come under the heading "with respect to the purchase and taking of lands otherwise than by agreement"; and that the other clauses, which, although relating to the purchase of lands otherwise than by agreement, do not come under the heading, was not excepted : *R. v. London Corporation* (1867), L. R. 2 Q. B. 292.

(12) By the City of London Sewers Act, 1848, the Lands Clauses Act, 1845, was incorporated with the exception of its provisions dealing with "the purchase and taking of lands otherwise than by agreement." By the special Act no compensation was given for the injurious affecting of lands generally. The plaintiff claimed compensation under sect. 68 of the Lands Clauses Act in respect of injurious affection :—*Held*, that sect. 68 was not incorporated in the special Act, and that the plaintiff was not entitled to claim compensation. Whether, if sect. 68 had been incorporated, compensation could have been claimed under it, the plaintiff not being entitled to compensation by any other statutory provision, *quære* : *Ferrar v. Sewers Commissioners* (1869), L. R. 4 Ex. 227 ; approved in *R. v. St. Luke's, Chelsea*, *post*.

(13) An Act incorporated the Lands Clauses Act, 1845, "except the part of the last-mentioned Act with respect to the purchase and taking of lands otherwise than by agreement." A claim for compensation was sent in under sect. 68 of the Lands Clauses Act. It was *held* that there was no right to compensation : *Dungey v. London Corporation* (1869), 38 L. J. C. P. 298.

(14) A railway company took possession of land without complying with the provisions of the Lands Clauses Act, and without the consent of the landowner, who brought ejectment and recovered possession. His possession was disturbed by the company, who gave notice of their intention to proceed under the Lands Clauses Act. He was *held* entitled to restrain them from so proceeding, and also from trespassing on the land ; and on his submitting to have the land valued a decree was made for an inquiry as to the present value of the land, including mesne profits for six years, and for payment by the company accordingly, they preferring such decree to an injunction : *Stretton v. Great Western and Brentford Ry.* (1870), L. R. 5 Ch. 751.

(15) By the Chelsea Improvement Act, 1845, s. 83, "so much of the Lands Clauses Consolidation Act, 1845, as is applicable, and is not modified or is not inconsistent with the provisions hereof, shall apply to the improvements authorised by this Act to be made, and shall be read as forming part of this Act." By sect. 104 the commissioners under the Act may, subject to the provisions of the Act, alter the level of the streets, nothing being said as to compensation. By sects. 124 and 127 the commissioners may remove from houses projections into the street which were existing at the passing of the Act, and also, on the rebuilding of projecting houses, set them back to the line of the street, with a proviso that the commissioners shall make compensation to the owner in either case. The commissioners, by raising the level of a street under sect. 104, impeded access to the house of which the prosecutor was lessee, and so injuriously affected it :—*Held*, that the lessee of the house was entitled to compensation under sect. 68 of the Lands Clauses Act, and that the fact of compensation being expressly given in cases under sects. 124 and 127 of the local Act was not inconsistent with the intention that it should be given in cases within sect. 104, by virtue of the general enactment in sect. 68 of the Lands Clauses Act : *R. v. St. Luke's, Chelsea (Vestry)* (1871), L. R. 7 Q. B. 148. "It has been observed . . . that there is no express title to compensation conferred by the terms of this section upon

persons whose property is injuriously affected. But the language assumes that the party to whom the provisions of the section shall apply is already entitled by force of some Act of Parliament to the compensation which he claims. It is not 'any party whose property shall have been injuriously affected shall be entitled to compensation,' but it is, 'if any party shall be entitled to compensation in respect of any lands, or of any interest therein, which shall have been taken or injuriously affected.' I forbear to pronounce any opinion as to what would be the effect of this section if this section alone of the Lands Clauses Act were incorporated in the special Act; because I am clearly of opinion, and I do not think it is open to any reasonable doubt, that the numerous provisions in the earlier portions of the Lands Clauses Acts, but especially the 22nd and 23rd sections, in themselves, clearly, directly, expressly and necessarily confer a title to compensation upon the person brought within the Act of Parliament whose interests are injuriously affected by the operations of any public body within the language of the Act": *per Kelly, C.B.*, at p. 151, *ib.*

(16) Under an agreement with a railway company a landowner was held precluded from claiming compensation for injury to land adjoining that which was taken by the company. A jury having awarded him compensation for such injury, it was *held* that as he had no right to such compensation he was not entitled to the costs of the inquisition: *Todd v. Metropolitan District Ry.* (1871), 24 L. T. 435.

(17) The Metropolis Management Act, 1855, incorporated the Lands Clauses Act, 1845, except clauses 16 to 68 inclusive. Under the powers given by the first-named Act land was injuriously affected by the raising of a street, but it was *held* that a claim for compensation under sect. 68 of the Lands Clauses Act could not be sustained: *Baker v. St. Marylebone (Vestry)* (1876), 35 L. T. 129.

(18) A lessee on behalf of himself and his lessors claimed compensation for injury to a ferry. He had no authority to use the lessors' name. The special Act provided for compensation to the lessors, but did not mention the lessee. The claim was for a lump sum. It was *held* that the Court had no general jurisdiction to restrain persons from acting without authority in proceedings out of court: *London and Blackwall Ry. v. Cross* (1885), 31 Ch. D. 354.

(d) In some cases a landowner may have a right of action which is not excluded by his power of claiming compensation.

Illustrations.

(1) A railway Act provided that the company should not injure any building erected before November 30th, 1835, other than such as were specified in the schedule to the Act, which contained a compensation clause. The company obstructed the lights of a house built before the above date and not specified in the schedule. It was *held* that the owner of the house had a right of action against them, and was not bound to proceed under the compensation clause: *Turner v. Sheffield and Rotherham Ry.* (1842), 10 M. & W. 425.

(2) An action was brought upon an award under the Public Health Act, 1848 (repealed by 37 & 38 Vict. c. 55). It was *held* that the award was not necessarily bad because it proceeded on the basis that works were defectively constructed, although such defective construction might have formed the subject of an action: *Uttley v. Todmorden Local Board* (1874), 44 L. J. C. P. 19.

(e) Restraining damage by injunction.

Illustrations.

(1) Where the damage inflicted upon the owner of land through the excessive exercise of its compulsory powers by a company is only slight, or the conduct of the owner has been vexatious or open to objection, the Court will decline to interfere by injunction: *per* Lord Cottenham, C., in *Holyoake v. Shrewsbury and Birmingham Ry.* (1848), 5 Rail. Cas. at pp. 427—428.

(2) A local board interfered with underground springs in an unauthorised manner, and thereby drew off water flowing in a surface watercourse. An injunction was ordered restraining them from so doing, and compensation was *held* not to be the remedy: *Grand Junction Canal v. Shugar* (1871), L. R. 6 Ch. 483; more fully reported 24 L. T. 402; and see *Bagnall v. London and North-Western Ry.* (1861), 7 H. & N. 423, *ante*, p. 347.

(3) A waterworks company fouled a stream by erecting a reservoir under statutory powers. The reservoir was a compensation directed to be made to mill-owners for the abstraction of water from the stream. A mill-owner was *held* entitled to an injunction restraining the fouling of the stream, the company having no statutory power to foul it, and the compensation clauses of the Waterworks Act not being applicable because of the absence of such statutory power: *Clowes v. Staffordshire Potteries Waterworks* (1872), L. R. 8 Ch. 125.

(4) The corporation of Bristol were empowered to take land and houses for the purpose of improving a street. The owners of some of the houses moved for an injunction restraining the corporation from taking more of the property than was required for that purpose. Vice-Chancellor Malins said: "I am of opinion that the principles of the railway cases do not apply to this case, and, consequently, that the plaintiffs have entirely failed in establishing any right to the interference of the Court in the way proposed": *Quinton v. Bristol Corporation* (1874), L. R. 17 Eq. 524.

(5) A canal company under their Act purchased a mill on a stream, from which they had the right to take water. Their conveyance gave them the rights of their vendor to the water. They succeeded in restraining a waterworks company, which purchased a mill higher up the stream, from using the water by collecting it in a reservoir for the use of a town, thereby diminishing the supply to the canal: *Swindon Waterworks v. Wilts and Berks Canal* (1875), L. R. 7 H. L. 697.

(6) S., the owner of certain land, had a dispute with the C. Vestry as to whether a drain on his land was a "drain" or a "sewer." The vestry gave S. notice that they would enter on his land and do certain work to the drain; they did not, however, do so, but proceeded against S. before a magistrate. S. brought an action for an injunction to restrain the vestry from entering on his land, and from proceeding against him before the magistrate. The statement of claim did not allege that the vestry threatened or intended to enter on S.'s land:—*Held* that, as S. did not allege or prove an intention to trespass there was no case for an injunction against a trespass, and therefore there was no jurisdiction to restrain the vestry from proceeding before the magistrate: *Stannard v. St. Giles's, Camberwell (Vestry)* (1882), 20 Ch. D. 190.

(7) The plaintiff sought an injunction to restrain the defendants from carrying on their works so as to occasion a nuisance by night, alleging that this was an unreasonable and vexatious use of their statutory powers. No negligence was alleged. He also claimed damages:—*Held* that, upon the assumption that working at night was unreasonable and rendered the plaintiff's house uninhabitable, a good cause of action was disclosed, and that the fact that compensation could be obtained under sect. 68 of the Lands Clauses Act did not exclude the regulating and restraining jurisdiction of the Court: *Roberts v. Charing Cross, Euston and Hampstead Ry.* (1903), 87 L. T. 732.

(f) Land taken under compulsory powers may be used for any purpose not inconsistent with the statute or statutes under which it is taken.

Illustrations.

(1) A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on the part of the conservators that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect: *Att.-Gen. v. Great Eastern Ry.* (1871), L. R. 6 Ch. 572.

(2) Where a railway company is authorised to take for the purposes of their undertaking any lands specially described in their Act, it is for them to decide whether they will or will not take any particular lands, so long as they act *bonâ fide* for the purposes of their Act and not for any collateral purpose: *Stockton and Darlington Ry. v. Brown* (1860), 9 H. L. Cas. 246; followed in *Kemp v. South-Eastern Ry.* (1872), L. R. 7 Ch. 364.

(3) A waterworks company purchased a mill on a stream. They diverted the water into a reservoir, and so reduced the flow of the stream, and also the flow of water in an adjacent canal. In an action for an injunction by riparian owners lower down the stream:—*Held*, that an injunction must be granted, inasmuch as the waterworks company had no right to touse the water in the way they had: *Swindon Waterworks Co. v. Wilts and Berks Canal* (1875), L. R. 7 H. L. 697.

(4) A railway company allowed a strip of land, forming part of a field purchased under their Act, to be occupied and cultivated without interference for more than twenty years with the rest of the field. It was *held* that the strip was to be treated as superfluous land and as vested in the owner of the rest of the field, and that the title of the company was extinguished: *Norton v. London and North-Western Ry.* (1879), 13 Ch. D. 268.

(5) A coal merchant had been in possession of land used as a wharf, the property of a railway company, to the exclusion of the company for more than twelve years. The company was *held* barred by lapse of time, though they actually required the land for the purpose of making a siding: *Bobbett v. South-Eastern Ry.* (1882), 9 Q. B. D. 424.

(6) Promoters cannot enter into an agreement which binds themselves and their successors with owners of land not to exercise the full powers given them by statute with regard to the land in question. Promoters cannot act as they please in such a matter in the same way as private individuals: *Ayr Harbour Trustees v. Oswald* (1883), 8 App. Cas. 623.

(7) A railway company erected on their own land a screen which obstructed lights in an adjoining house which were not ancient lights. They were *held* entitled so to do, for the purpose of preventing the acquisition by the house of an easement over their land: *Bonner v. Great Western Ry.* (1883), 34 Ch. D. 1.

(8) A railway company under their statutory powers purchased land on which there was a stable. The conveyance contained general words. There was a private road leading to the stable over other land of the vendor. The company were *held* entitled to use the private road (of which there was no express mention in the conveyance) at all events until the stable was converted to some purpose connected with the railway: *Bayley v. Great Western Ry.* (1884), 26 Ch. D. 434.

(9) A railway crossed a stream, lower down on which there was a mill. The railway company inserted a pipe into the stream at the crossing, which was the only point where

their land adjoined the stream, to carry water to a distant tank, which supplied their engines. The pipe would not substantially interfere with the mill:—*Held*, that the water was not taken for purposes connected with the company's land where it crossed the stream, and that they were not entitled to abstract the water: *McCartney v. Londonderry and Lough Swilly Ry.*, [1904] A. C. 301.

(g) A right to compensation may be assigned.

Illustration.

After structural damage had been caused to certain houses by the execution of a railway company's works, the lease of these houses was assigned to the plaintiff, together with all rights of compensation in respect of structural damage caused thereto. No notice to treat was served in respect of these houses:—*Held*, that the assignment to the plaintiff was valid as a legal chose in action, and that the plaintiff could claim compensation for injurious affection in his own name: *Dawson v. Great Northern Ry.*, [1905] 1 K. B. 260.

IX. Duty of promoters to proceed.

(a) If a claim is made against promoters they must proceed in due course, otherwise they may be liable in an action.

Illustrations.

(1) A railway company gave notice to treat. The landowner stated the amount of his claim. The company neither summoned a jury nor referred the matter to arbitration, nor within twenty-one days acquiesced:—*Held* that the landowner had a right of action for the amount claimed: *Eaton v. Midland Great Western Ry.* (1847), 10 Ir. L. R. 310.

(2) In an action to recover the full compensation claimed on the ground of default to summon a jury within twenty-one days under sect. 68 of the Lands Clauses Act, a plea "that the claim was not a *bonâ fide* claim within the statute, but in fraud of the defendants and without any reasonable cause," was not allowed; but the defendants were allowed to set out the facts on which they relied: *Hooper v. Bristol Port Ry.* (1866), 35 L. J. C. P. 299.

(b) But as a rule promoters who are not acting *ultra vires* will not be treated as wrong-doers; and this may be justified on the ground that it may be to the public interest that the particular works should proceed, so that the person aggrieved will be left to his remedy by compensation.

Illustrations.

(1) Under a special Act a railway company had power to enter on land on making deposit of the compensation money. By agreement with a landowner they entered on his land pending a reference to arbitration, under which an award was made; but disputes having arisen as to the conveyance, the landowner brought ejectment. It was *held* that he could not treat the company as trespassers, but must proceed under the award: *Doe d. Hudson v. Leeds and Bradford Ry.* (1851), 16 Q. B. 796.

(2) Two railway companies entered upon land for the purposes of their works and took a conveyance from persons who claimed to be owners of the land. Other persons who claimed to be part owners moved for an injunction restraining the companies from

remaining in possession. The motion was refused on the companies undertaking to proceed under the 85th section: *Alston v. Eastern Counties Ry.* (1855), 1 Jur. (N.S.) 1009.

(3) A canal company having power to purchase lands for gross sums or yearly rent-charges, to be determined by commissioners in cases of disability, took possession of lands belonging to an infant, on an agreement with his steward, and, after an award by commissioners of the gross sum or annual rent-charge which ought to be paid (but which award was invalid, no one being a party to it who had power to bind the infant's interest), the awarded sum was paid by the company to the steward upon an agreement for its return if the land were not conveyed to the company when the infant became of age. No conveyance was executed, and the purchase-money was repaid, but the company continued in possession of the land for their canal, paying the owner, for forty years after he attained his majority, a rent of nearly the amount awarded by the commissioners. The company also, with his knowledge, purchased the interests of shareholders in the lands:—*Held*, that an action of ejectment brought by the landowner and the intended erection of a bridge by him ought to be restrained by injunction on the ground of acquiescence, the company undertaking to put into operation their Parliamentary powers to acquire the land: *Somersetshire Coal Canal v. Harcourt* (1857), 2 De G. & J. 596.

(4) Subsequently to a notice to treat an undivided share of the land was conveyed to a purchaser, who filed a bill for an injunction restraining the railway company from entering upon or continuing in possession of the land. The bill was dismissed with costs: *Carnochan v. Norwich and Spalding Ry.* (1858), 26 Beav. 169.

(5) A railway company by mistake entered on lands not included in their notice. The landowner after some delay filed a bill to restrain them from proceeding with their works on the land; but an injunction was refused on the ground that to grant it would be an injury to the public, the only question between the landowner and the company being one of value: *Wood v. Charing Cross Ry.* (1863), 33 Beav. 290.

(6) A railway company under their Act were bound to exercise their compulsory powers within three years and to complete the railway within five years. They gave a landowner notice to treat a few days before the end of the three years, and nothing further having been done, entered on the land under sect. 85 of the Lands Clauses Act thirteen days before the expiration of the five years. The entry was *held* lawful, whether the railway could or could not have been completed within the thirteen days: *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480.

(c) The Court will not allow a company to go on doing injury unless it is clear that the Court can afterwards compel them to remedy such injury.

Illustrations.

(1) "I do not assent to the proposition that this Court will let a defendant go on with his works, trusting to what he will hereafter do, unless it be very clear that the Court has the power to compel him to do it; because it is nothing to say that the defendants have done all the injury they intended to do. They have no right to do anything: they have no right to commence or finish anything, if the construction of the Act is against them. . . . If the construction of the Act is against them, they have no right to do anything without putting the plaintiff in the situation in which the 69th clause entitles him to be placed": *per* Lord Cottenham, C., in *Bell v. Hull and Selby Ry.* (1840), 1 Rail. Cas. at p. 636; see *ante*, p. 337.

(2) "The Court will not suffer powerful corporate bodies, with which it is very difficult to deal, to take, under their Acts of Parliament, proceedings which are of an illegal character or which are of doubtful legality, if, by so doing, they place those against whom they are proceeding in a condition of peril, from which it might be difficult for them to extricate themselves": *per* Lord Cranworth, V.-C., in *Pinchin v. London and Blackwall Ry.* (1854), 5 De G. M. & G. 851.

(d) Declaration of title may be made by the Court.

Illustration.

A railway company took possession of land without having complied with the requirements of the Lands Clauses Act. An occupier under a building agreement, whose interest the company disputed, moved for an injunction and claimed a declaration of title. It was *held* that the Court had jurisdiction to make such a declaration: *Birmingham Land Co. v. London and North-Western Ry.* (1888), 40 Ch. D. 268.

X. The following cases illustrate the rights of promoters and land-owners as to the time when compensation should be claimed (*and see* sect. 38, *ante*):—

Illustrations.

(1) A railway Act provided for issuing a warrant to a jury to assess damages, the claimants entering into a bond to prosecute their claim. It was *held* that the bond, unless required by the company, was not a condition precedent to the issue of a *mandamus* to summon a jury: *R. v. North Union Ry.* (1840), 1 Rail. Cas. 729.

(2) A landowner gave notice to promoters of his claim for compensation in respect of land injuriously affected and his desire to have the amount settled by a jury. It was *held* that sect. 38 of the Lands Clauses Act, which requires notice to be given of the intention of the promoters to issue their warrant, does not apply to such a case: *Railstone v. York, Newcastle and Berwick Ry.* (1850), 15 Q. B. 404.

(3) Compensation having been agreed upon in satisfaction of injury to property, the claimant served notice on the promoters claiming compensation under the Lands Clauses Act. An injunction was granted restraining proceedings under the notice, there being a case for specific performance under the agreement: *Norfolk (Duke) v. Tennant* (1852), 9 Hare, 745; and see *Inge v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 3 De G. M. & G. 658.

(4) The giving of a notice for a special jury after a previous notice of assessment by a common jury has not the effect of extending the time for the issuing of the warrant to twenty-one days after service of the second notice. Therefore an action will lie for the amount claimed unless the warrant issues within twenty-one days from the receipt of the first notice: *Glyn v. Aberdure Valley Ry.* (1859), 6 C. B. N. S. 359.

(5) Sect. 106 of the Metropolis Management Amendment Act, 1862 (repealed by 56 & 57 Vict. c. 61), provided that no proceeding should be commenced against the Board after six months from the accrual of the cause of action. It was *held* that this did not apply to notice of claim and demand of arbitration under the Lands Clauses Act for damage done to buildings: *Delany v. Metropolitan Board of Works* (1867), L. R. 3 C. P. 111.

Application of Compensation.

And with respect to the Purchase Money or Compensation coming to Parties having limited Interests, or prevented from treating, or not making Title, be it enacted as follows :

69. If the Purchase Money or Compensation which shall be payable in respect of any Lands or any Interest therein, purchased or taken by the Promoters of the Undertaking from any Corporation, Tenant for Life or in Tail, married Woman seised in her own Right or entitled to Dower, Guardian, Committee of Lunatic or Idiot, Trustee, Executor or Administrator, or Person having a partial or qualified Interest only in such Lands, and not entitled to sell or convey the same except under the Provisions of this or the Special Act, or the Compensation to be paid for any permanent Damage to any such Lands, amount to or exceed the Sum of Two hundred Pounds, the same shall be paid into the Bank, in the Name and with the Privity of the Accountant General of the Court of Chancery *in England if the same relate to Lands in England or Wales, or the Accountant General of the Court of Exchequer in Ireland if the same relate to Lands in Ireland*, to be placed to the Account there of such Accountant General, ex parte the Promoters of the Undertaking (describing them by their proper Name), in the Matter of the Special Act (citing it), pursuant to the Method prescribed by any Act for the Time being in force for regulating Monies paid into the said Courts ; and such Monies shall remain so deposited until the same be applied to some one or more of the following Purposes ; (that is to say,)

Purchase Money payable to Parties under Disability amounting to 200*l.* to be deposited in the Bank. In the Purchase or Redemption of the Land Tax, or the Discharge of any Debt or Incumbrance affecting the Land in respect of which such Money shall have been paid, or affecting other Lands settled therewith to the same or the like Uses, Trusts, or Purposes ; or

In the Purchase of other Lands to be conveyed, limited, and settled upon the like Uses, Trusts, and Purposes, and in the

same Manner, as the Lands in respect of which such Money shall have been paid stood settled ; or

If such Money shall be paid in respect of any Buildings taken under the Authority of this or the Special Act, or injured by the Proximity of the Works, in removing or replacing such Buildings or substituting others in their Stead, in such Manner as the Court of Chancery shall direct ; or

In payment to any Party becoming absolutely entitled to such Money.

NOTE.—The words in *italics* were repealed by the Statute Law Revision Act, 1892.

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I. In what circumstances the purchase-money or compensation must be paid into court under the section.

Purchase-money or compensation must be paid into court if it amounts to or exceeds 200*l.* when—

- (A) The vendor fails to make a good title ;
- (B) It is payable into Court in respect of lands of parties with limited interests, viz. :—
 - Any corporation (sole or aggregate) ;
 - Tenant for life or in tail ;
 - Married woman seised in her own right or entitled to dower ;
 - Guardian ;
 - Committee of lunatic or idiot ;
 - Trustees ;
 - Executor or administrator ;
 - Person having qualified interest in such land and only entitled to sell under this or the special Act.

- (a) The object of the section.

Illustration.

[Sect. 69] “applies to purchase-money or compensation in respect of lands taken from, first, a corporation which, not being beneficially entitled, has no power of sale, or which, being under some statutory disability, cannot sell ; then a tenant for life or in tail—that is, a tenant in tail incapable of selling, as, for instance, where estates are settled and made inalienable by Act of Parliament, and a tenant in tail who is prevented by law from selling, as, for instance, a tenant in special tail after possibility of issue extinct, who for all purposes of alienation is considered merely as a tenant for life ; then, again, a married woman seised in her own right or entitled to dower, who cannot sell except with the concurrence of her husband, they being together owners in fee ; then a guardian or committee, neither of whom can sell for himself ; then a trustee, executor or administrator who may have the entire fee simple, like a corporation, and yet not be able to sell. Thus we find that the great majority of the persons here described are persons taking under no settlement and having no settled estate at all in the real sense of the term” : *per* Jessel, M.R., in *Kelland v. Fulford* (1877), 6 Ch. D. 491, 494.

- (b) Sale by corporations.

Illustration.

The C. W. Company were the owners of certain lands, upon which part of their works, *i.e.*, certain pipes, were laid ; and this land the M. Board of Works obtained power to take, another place being provided for the pipes. Before the removal of the pipes the board of works proceeded to buy the land under the provisions of the Lands Clauses Act. By that Act the C. W. Company had no power to sell any land upon which their works were actually subsisting :—*Held*, therefore, that the purchase-money was rightly paid into court ; *held also* that, as the money could not be applied to any of the purposes in the 69th section, the C. W. Company was absolutely entitled to the money, and that it should be paid out to them : *In re Chelsea Waterworks* (1887), 56 L. J. Ch. 640.

- (c) Sale by tenant for life or trustee.

Illustration.

Hereditaments were granted by a settlement to the use of P. and his assigns for his life, with remainder to trustees to preserve contingent remainders, with divers remainders over ;

and the settlement gave the trustees a power of sale during his life with his consent in writing. No estate in the settled land was vested in the trustees. In 1876 a railway company gave notice to treat for part of the settled land to the trustees, and a separate notice to P. and to J., a person in whom P.'s life interest had become vested. Difficulties arose in carrying out the purchase, and the company contended that the land should be conveyed to them under the power of sale in the settlement, and that the purchase-money should be paid to the trustees exercising the power. P. and J., however, insisted that the sale ought to be carried out as a sale by a tenant for life under the Lands Clauses Act on payment of the purchase-money into Court :—*Held*, that the latter contention was correct : *In re Pigott and Great Western Ry.* (1881), 18 Ch. D. 146.

NOTE 1.—If a contract is complete before the death of the vendor who has more than a mere limited interest the section does not apply.

Illustration to Note 1.

A railway company served notice to treat on N., who agreed in writing to sell to the company. The company accepted the title. N. executed a conveyance and handed it to his solicitor as an escrow, and gave written authority to the company to pay the purchase-money to the solicitor. N. died shortly after. The company paid in the purchase-money and took possession :—*Held*, that the fact of there being a contract took the case out of the operation of the Lands Clauses Act ; and that N. being an absolute owner, the dealing was with him, and not with his "executor or administrator" under sect. 69 : *Newton v. Metropolitan Ry.* (1861), 10 W. R. 102.

NOTE 2.—If by agreement the purchase-money is to be paid into court the purchase is completed when that is done.

Illustration to Note 2.

A railway company contracted with the owner of land to pay interest for the purchase-money and compensation to be awarded for so much of the land as the company should take ; and it was agreed that the money should be deposited in a certain bank until the completion of the purchase, and that interest should be paid to the owner until, and inclusive of, the day on which the purchase should be completed :—*Held*, that the reasonable construction of this agreement was that it referred to the completion of the purchase by the purchaser ; that, on the part of the purchaser, the purchase was completed by the payment of the purchase-money into court ; and that it did not of necessity refer to the complete conveyance of the estate and the final settlement of the purchase : *Lewis v. South Wales Ry.* (1852), 10 Hare, 113.

II. How money is to be ear-marked at the bank.

(a) It is to be paid into the bank *in the name* and with the privity of the Accountant-General of the Court of Chancery, now of the Paymaster-General (*vide* Court of Chancery (Funds) Act, 1872, 35 & 36 Vict. c. 44 ; and Supreme Court of Judicature (Funds, &c.) Act, 1883, 46 & 47 Vict. c. 29), to be placed to his account, *ex parte* the promoters of the undertaking, in the matter of the special Act (citing it).

(b) Effect of non-compliance with these rules.

Illustration.

In some cases "the fund had been carried over, omitting from the title of the account all reference to the name of the undertakers or to any Act of Parliament. In those cases the fund was put beyond the control of the undertakers, and there could be no power to bring them before the Court and make them pay the costs. In two or three cases the report leaves it in doubt whether there was any reference to the undertakers in the account, though I must say that in *Brown v. Fenwick* (1866), 14 W. R. 257, the decision of the Court is put rather on the ground that the title to the Act was not retained, but there is nothing to show that the undertakers' name was retained. . . . It has been the practice for many years to draw up orders transferring funds in such cases as the present to accounts without reference to the Act or the Lands Clauses Act, and the registrar has produced orders for reinvestment where, although the funds stood to the credit of accounts which had no reference to any special Act or the Lands Clauses Acts, the undertakers have been required to pay the costs of reinvestment. In following those orders I shall only adopt what I consider the ordinary practice under the Lands Clauses Consolidation Act": *per* North, J., in *Drake v. Greaves* (1886), 33 Ch. D. at p. 611.

III. Enforcing payment of money into the bank.

(a) Promoters may, if necessary, be compelled by action of *mandamus*.

Illustration.

(1) An award was made of compensation for land taken by a railway company :—*Held*, that a *mandamus* would be granted against the company to compel them to deposit the amount awarded into a bank under sect. 69 : *Barnett v. Great Eastern Ry.* (1868), 18 L. T. 408 ; *see also* sect. 12 (*ante*), and Order LIII. of the Rules of the Supreme Court.

(b) If the purchase-money is paid to the vendors, they will, on motion, be directed to pay it into court.

Illustrations.

In 1847 a corporation agreed to sell a piece of land to the L. and N. W. Railway Co. A conveyance had been prepared, but not executed, and the company had taken possession and executed their works. Some adverse claims which had arisen being unsettled, the corporation pressed for payment of the purchase-money, and afterwards obtained judgment in ejectment. The sheriff took possession, and, in order to get him out, the company paid the purchase-money under protest. Upon a bill filed by the company, the corporation were, on motion, ordered to pay into court the purchase-money in their hands for its interim protection : *London and North-Western Ry. v. Lancaster Corporation* (1851), 15 Beav. 22.

(2) A railway company took land, and delayed paying the purchase-money into court :—*Held* that, as a rule, a company ought to pay in at once, and not wait for notice of motion : *Williams v. Llanelly Ry.* (1868), 19 L. T. 310.

(c) In special cases payment into court may be dispensed with.

Illustrations.

(1) A railway company took part of an estate of which A. was tenant in tail, and instead of depositing the purchase-money in court, paid it direct to A., who afterwards

applied by petition that the money might be invested in the purchase of hereditaments of which he was seised in fee simple. Romilly, M.R., in the circumstances dispensed with the payment into court, and ordered the investment to be carried out as prayed : *In re London, Brighton and South Coast Ry., Ex parte Earl of Abergavenny* (1855), 4 W. R. 315.

(2) The committee of a lunatic's estate having entered into a provisional contract for the sale of land to a railway company, and the contract having been approved by the master, the company declaring themselves satisfied with the title, an order was made for payment of the purchase-money to the credit of the lunacy and for its investment to the joint account of the lunatic and the company, without its first being paid into court under sect. 69 : *In re Milnes*, (1875) 1 Ch. D. 28. "If . . . the company declare themselves satisfied with the title, we will make an order for payment of the purchase-money to the credit of the lunacy, and for its investment to the joint account of the lunatic and the railway company. As the committee may be changed, it will be better that the fund should stand to this account than to the account of the committee and the company. . . . We are of opinion that the company will acquire as good a title as if there was a payment into court under sect. 69 of the Lands Clauses Act, but the petition must be amended so as to be intituled in the Chancery Division as well as in Lunacy, and in the matter of the railway Act as well as in the matter of the lunatic " : *per James, L.J.* at p. 29, *ib.*

(d) A company taking possession under sect. 85 and paying a sum of money into court must, on the value being ascertained, pay the balance into court.

Illustrations.

(1) Land having been taken by a railway company, the estimated value, 250*l.*, was paid into court, and the company entered. The purchase-money was afterwards fixed by arbitration at 300*l.* Upon petition by the trustees, the balance of 50*l.* was ordered to be paid into court, the whole sum of 300*l.* to be invested, and the dividends paid to the tenant for life : *Ex parte London, Tilbury and Southend Ry.* (1852), 1 W. R. 535.

(2) Where a railway company took possession of A.'s land, under sect. 85 of the Lands Clauses Act, and paid into court 86*l.* as the value of the land, and the land was afterwards valued at 1,227*l.* :—*Held*, that the company must pay the difference into court : *Ashford v. London, Chatham and Dover Ry.* (1866), 14 L. T. 787.

IV. Conversion of purchase-money.

(a) When land belonging to a person under disability is taken under statutory powers, the purchase-money paid into court becomes reconverted, or, in other words, retains the character of real estate, until some person is absolutely entitled to it.

Illustrations.

(1) By marriage articles, money was to be laid out in land to uses of a husband and wife for life, then to the children, as they should appoint : in default of appointment, in equal shares ; if but one child, to that one in tail ; reversion to husband in fee. There was one daughter. The trustee paid the money to her and her husband, she not being *sui juris* and not separately examined :—*Held*, that the payment was not sufficient to cause it to be considered as money, and a sister of the half-blood might claim the reversion in fee from the father, but the husband of the other sister, who was tenant in tail, was tenant by the curtesy : *Cunningham v. Moody* (1748), 1 Ves. Sen. 174.

(2) A railway company gave notice to treat to T. O., who was at that time, and continued until his death to be, in an imbecile state of mind. Before so becoming imbecile, T. O. made a will whereby he gave and bequeathed "all my money, goods, chattels, estates and effects of what nature or kind soever and wheresoever the same may be found" to his wife for life, and, after her decease, to her children in equal shares. T. O. died before the purchase-money was paid :—*Held*, that the land was not converted into money by the railway Act, and therefore belonged to the devisees of the land : *Midland Counties Ry. v. Oswin* (1844), 3 Rail. Cas. 497.

(3) Money paid into court by a company for land taken under the Lands Clauses Act from a person who was in a state of imbecility, and who so continued until his death, but had never been found a lunatic, was ordered by Lord Cranworth, after the imbecile's death, not to be reinvested or deemed to be land, but to be paid out to his executors : *Ex parte Flamank, In re East Lincolnshire Ry.* (1851), 1 Sim. (N.S.) 260. This decision of Lord Cranworth was, however, dissented from and not followed by Pearson, J., in *In re Tugwell* (1884), 27 Ch. D. 309. That learned judge said : "The purchase-money was in court, and the heir, who could have brought ejectment for the land, was willing to accept the money and to confirm the sale, and yet Lord Cranworth arrived at the extraordinary conclusion that the money must be handed over to persons who could not make out a title to it or to the land. The land might be taken from the company because they had bought it from the wrong person, and the money must be taken away from them because they could not be heard to say that they had not bought from the right person" : p. 314.

(4) A poor law union took lands under statutory powers and paid the purchase-money into court. On the petition of the tenant for life, the amount was invested in stock, and the dividends were, under an order of the court, paid to her for life. On her death, intermediate limitations having failed, her heir at law, to whom the ultimate remainder was limited, petitioned the court that the stock might be paid out to him :—*Held*, that the stock continued to be realty, and the money was directed to be paid out to him : *In re Horner's Estate* (1852), 5 De G. & S. 483.

(5) Freehold land was settled upon trust for sale after the death either of husband and wife, at the request of the survivor, and to stand seised and possessed of the estate until sold, and of the purchase-money, if sold, upon trust for the husband for his life ; and after his decease, upon trust for the wife for her life ; and after the death of the survivor of them, to convey the estate, unless sold, and assign the personalty unto the children and grandchildren born in the lifetime of the husband and wife, as they or the survivor should appoint ; and in default of appointment, unto and amongst the children of the marriage equally. The estate was taken by a corporation under a special Act, and the price (assessed by a jury) paid into court, the trustees of the settlement not making out a satisfactory title :—*Held* that, in the absence of any conveyance by the trustees, the sale must be deemed to have been effected under the Act of Parliament only, and therefore that the purchase-money was impressed with the character of real estate under the Act : *In re Taylor's Settlement* (1852), 9 Hare, 596.

(6) Land settled on A. for life, with remainder to her children, with remainder to B., in default of children, in fee, was taken under statutory powers, which contained the usual disability clauses. The money was paid into court and invested in Consols, and the dividends ordered to be paid to A. for life. In 1844 B. died and in 1849 A. died, without children. B. had done no act in his lifetime showing any intention to treat the Consols as personalty :—*Held*, that the Consols were to be treated as realty, and not personalty, of B. *Quære* whether B. could, by any act during the life of A., have elected to treat the created Consols as personalty and not realty : *Ex parte Cramer, In re Stewart* (1852), 22 L. J. Ch. 369.

(7) A landowner agreed to sell such land as the company should take at a fixed sum per acre. The landowner died, and subsequently the company took some of his land :—

Held, that the purchase-money was realty : *Ex parte Walker, In re Shrewsbury and Hereford Ry.* (1853), 1 Drew. 508.

(8) Purchase-money representing land bought, to a share of which T. B. was entitled, was paid into court in 1842. In 1848 T. B. was sentenced to transportation for felony, and his share of the money was carried to an account entitled "The share of T. B., a convicted felon." After the expiry of the sentence T. B. applied to have his share paid him :—*Held*, that the money was to be deemed to be realty, and that it was therefore not forfeited to the Crown, and the order was made : *Re Harrop's Estate* (1857), 3 Drew. 726.

(9) H. gave his children in succession the option of purchasing his real estate, and, in the meantime, the rents were to be divided equally among them. Before any option had been exercised, and while some of the children were still infants, a corporation purchased part of the property for public improvements under compulsory Parliamentary powers :—*Held*, that the shares of children who had died infants continued to be real estate until the option had been exercised, and that in the meantime the income of the purchase-money belonged to their heir at law : *Ex parte Hardy* (1861), 30 Beav. 206.

(10) W., who was tenant for life under a settlement, with ultimate remainder to himself in fee, agreed in writing to sell land to a railway company, whose Act, although passed before the Lands Clauses Act, contained similar provisions as to sale of land by persons under disability and owners in fee. No conveyance was executed. W. died leaving a will, by which he specifically devised the land in question. The company paid interest on the purchase-money to W. during his life and to the remainderman afterwards :—*Held*, (1) that there was no conversion, and that the purchase-money descended as land ; (2) that the specific devise failed, and that the purchase-money went to W.'s heir : *In re Bagot's Settlement* (1862), 10 W. R. 607.

(11) Freeholds in which a lunatic was interested were taken by a company under statutory powers, and the purchase-money, which, under the Act, was liable to be invested in land, was paid into court and laid out in Government funds. The existence of this fund was overlooked, and it went on accumulating. P., who became tenant in tail in possession, with immediate remainder to her in fee, devised her realty and bequeathed "all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public, Government or Parliamentary funds," but she expressed no further intention as to conversion :—*Held*, that the principal fund passed as realty and the accumulations as personality : *Dirie v. Wright* (1863), 32 Beav. 662.

(12) Real estate was settled by a marriage settlement not comprising any personality. The tenant for life sold part of the land to a company under the powers of their Act, and the proceeds were paid into court and invested. Afterwards the tenant for life, under a power in the settlement, appointed by will to his son the whole settled estate and the purchase-money of the part sold. The son by will disposed of his residuary personal estate of which he might be possessed or over which he might have any power of disposition at his decease, including in such personal estate "all monies to which I may be entitled under the marriage settlement of my father and mother"; and he declared that he did not by his will intend to dispose of any real estate, but only of personal estate and chattels real. The widow of the tenant for life, who was entitled to a jointure, was still living :—*Held*, that the fund arising from the sale did not pass by the will : *In re Sheggs* (1865), 1 De G. J. & S. 533.

(13) Purchase-money paid into court by a railway company under sect. 69 for land of which an infant is absolutely seised in fee remains impressed with the character of real estate, and upon the infant's death goes to his heir at law : *Kelland v. Fulford* (1877), 6 Ch. D. 491. "Till the person becomes entitled to the money to his or her own use there is a constructive reconversion, which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand

limited to the same uses as the lands sold stood limited, and therefore must be considered as land " : *per* Jessel, M.R., at p. 495, *ib.*

(14) The Corporation of L., acting under statutory powers, gave notice of their intention to acquire lands belonging to T., a person of unsound mind. The value of the land was ascertained by two surveyors, one nominated by each party, and the sum thus determined was paid into court. The corporation then took possession. T. afterwards died intestate, and was still of unsound mind at the date of her death. The heir at law petitioned for payment of the money to him :—*Held*, that the money had continued to be impressed with the character of realty, and that it belonged to the heir at law : *In re Tugwell* (1884), 27 Ch. D. 309.

(15) "The only remaining question is whether the money in court paid in under the Lands Clauses Consolidation Act stands upon the same footing as land. I cannot get out of the conclusion that these cases about disentailing deeds support the contention that the money does stand in the same position as land until the moment comes when some person is absolutely entitled to it. So long as that is uncertain, and the time has not arrived, the money is in court under a statutory trust for investment in land, and must be conveyed in the same way as land " : *per* Wright, J., in *Dearberg v. Letchford* (1895), 72 L. T. at p. 490.

(b) If the agreement is to sell land, and the promoters take the land under the agreement after the death of the vendor, the purchase-money still forms part of his real estate.

Illustrations.

(1) C. W., the owner of certain land within the limits of deviation allowed to a railway company for the making of their line, agreed with the company that, in case they should construct their intended railway, they should pay C. W. for whatever land they took at the rate of 500*l.* per acre. After C. W.'s death the company took five acres of the land in question :—*Held*, that there was no conversion, and that the purchase-money passed as realty : *In re Walker's Estate* (1853), 22 L. J. Ch. 888.

(2) A railway company gave H. notice to treat, but nothing was done by H. with respect to or in consequence of it. H. died, having by his will made a specific devise of the lands included in the notice to treat :—*Held*, that the notice to treat did not *per se* constitute a contract by the owner for the sale of the property ; and that if it did, an action for specific performance would not lie against the owner, and hence the notice to treat did not affect conversion of the property : *Haynes v. Haynes* (1861), 1 Dr. & Sm. 426 ; see *ante*, p. 153.

(3) Commissioners having compulsory powers to purchase lands gave notice to an owner of freeholds to take them and to treat. He, in reply, stated the price he was willing to take, but died before acceptance of the offer. The purchase was afterwards completed at that price :—*Held*, that the realty had not been converted into personalty at the death of the owner, and that the purchase-money belonged to his heir at law : *Ex parte Arnold, In re Battersea Park Acts* (1863), 32 Beav. 591.

(4) A railway company served notice to treat on A., who let the company enter under a verbal agreement. A. died before the compensation was ascertained :—*Held*, that there was no conversion : *Righton v. Righton* (1886), 36 L. J. Ch. 61.

(c) Where, however, the contract for sale is complete, or the person entitled to the purchase-money is not under disability and elects to take

the money as personalty or has done some act the effect of which is to stop the reconversion, the money will be deemed to be personalty.

Illustrations.

(1) In 1840 a corporation, acting under statutory powers, took a freehold house belonging to H. and agreed with him as to the amount of the purchase-money. In April, 1841, H. died, having by his will, dated in 1837, devised his realty to F. and his residuary personalty to J.:—*Held* that, at the time of his death, H. was entitled only to the money to be paid for the house, and that the residuary legatee was entitled to it: *Ex parte Hawkins* (1843), 13 Sim. 569.

(2) A testatrix devised a house to C. for ever and gave him the residue of her real and personal estate. After the date of her will, but before her death, the house was taken under statutory powers, and the value thereof (350*l.*) paid into court:—*Held*, that the 350*l.* was part of the testatrix's personalty: *Galliers v. Allen* (1843), 13 Sim. 577, *n.*

(3) In 1852 S. entered into a contract for the sale to a railway company of a portion of the lands devised by his will. He died in 1853, before the contract had been completed and the conveyance executed. Under the will, S.'s son, an infant, became entitled as tenant in tail in possession of the estate:—*Held*, that S. had, by contracting to sell, parted with the thing devised, and that the purchase-money became part of his personal estate: *In re Manchester and Southport Ry.* (1854), 19 Beav. 365.

(4) Land, of which W. was seised in fee, was taken by a railway company and the value ascertained by arbitration. After the date of the award, but before the purchase-money was paid or the conveyance executed, W. died. The company then paid the money into court:—*Held* that, as everything had been done before W.'s death to complete the contract, except the payment of the purchase-money, the fund in court was personalty: *In re Wootton's Trusts* (1862), 1 N. R. 193.

(5) A testator devised to his granddaughter a plot of freehold land by the description of "the portion of meadow land received by me in exchange from S.," and other plots to the same granddaughter, describing them by reference to the tenants in whose occupation they then were. Portions of the plot of land which the testator had acquired by exchange from S., and of certain of the plots which had been in the occupation of the several tenants named in the descriptions, were, at the date of the will, under contract for sale to a railway company. The company had taken possession before the date of the will, but the conveyance was not completed until after the testator's death:—*Held* that, as there remained lands to answer the descriptions in the will at the time of its date, such lands alone passed under the devise, and that the purchase-money paid by the railway company to the trustee of the testator's will ought to have been paid to the plaintiff, the residuary devisee and legatee: *In re Jackson, Wilson v. Donald* (1881), 44 L. T. 467.

V. Application of money deposited.

(a) (i.) The money in court may be ordered to be applied in the purchase or redemption of land tax.

Illustration.

The purchase-money in court was ordered to be paid out to the trustees of a will upon their undertaking to apply it in the redemption of land tax affecting other property vested in them as such trustees: *In re Lee and Hemingway* (1883), 24 Ch. D. 669.

- (ii) In the reimbursing a tenant for life who has redeemed land tax.

Illustration.

Where a company was authorised to purchase lands of corporations, tenants for life, &c., and directed that the purchase-money should be applied to the redemption of land tax upon other parts of the property sold:—*Held*, that a tenant for life who had redeemed the land tax, before the company had obtained its powers, might reimburse himself out of the proceeds of the lands purchased of him by the company: *Ex parte Northwick* (1834), 1 Y. & C. 166.

(b) The money in court may be ordered to be applied in the discharge of any debt or incumbrance affecting the land or other land settled to the same uses.

- (i.) Corporation mortgages and debts.

Illustrations.

(1) Where money, the produce of lands belonging to a corporation, had been paid into court under an Act authorising the Court to make such order concerning it, for the benefit of the parties interested, as the Court should think fit, it was *held* that the Court had no power (under the Municipal Corporations Act, 1835) to order the principal money to be paid in discharge of corporation debts accruing since the Act of 1835. The dividends only could be applied for that purpose. The trusts of the Municipal Corporations Act were applicable to personalty as well as to realty: *Ex parte Hythe Corporation* (1840), 4 Y. & C. 55. [Now, by sect. 139 of the Municipal Corporations Act, 1882, the rents and profits of all corporate land and the interest, dividends and annual proceeds of all money, valuable securities, &c., go to the borough fund.]

(2) A railway company took certain land belonging to a municipal corporation and paid the purchase-money into court. Other portions of the land belonging to the corporation had been mortgaged, and the money thus raised applied to public purposes:—*Held*, that the money in court might, under the railway company's Act, be applied in or towards the discharge of the incumbrances upon the land: *Ex parte Cambridge Corporation, In re Eastern Counties Ry.* (1848), 5 Rail. Cas. 204.

(3) Money paid in by a railway company for the purchase of lands belonging to a corporation was ordered to be applied in paying off mortgages secured on certain tolls which were ancient franchises: and was also allowed to pay off bonds given for money borrowed under the Baths and Washhouses Act, 1846, the interest on which was paid out of the borough fund, which was composed to a great extent of the rents and profits of real estate belonging to the corporation: *In re Derby Municipal Estates* (1876), 3 Ch. D. 289.

- (ii.) Money borrowed for land drainage may be paid off.

Illustration.

A summons asked for a declaration that trustees might apply capital money in payment of such part as represented principal of a rent-charge due to the Inclosure Commissioners for money borrowed for land drainage. This was allowed: *In re Newton's Settled Estates* (1889), 61 L. T. 787.

But not advances under the Drainage Act (5 & 6 Vict. c. 89), which are repayable by instalments by the tenant for life.

Illustration.

Purchase-money cannot be used in paying off advances under the Drainage Act (5 & 6 Vict. c. 89), repayable by instalments by the tenant for life, as the fund in court represents the *corpus* of the property, and the tenant for life is bound to pay the annual instalments which fall due during his lifetime: *Ex parte Studdert, In re Commissioners of Public Works* (1856), 6 Ir. Ch. R. 53.

(iii.) A tenant for life may be reimbursed expenses incurred by him in rebuilding condemned houses.

Illustration.

See *In re Davies' Estate, In re Crystal Palace and West End Ry.* (1858), 3 De G. & J. 144, *post*, p. 386.

(iv.) Statutory charges under inclosure Acts may be discharged.

Illustrations.

(1) A railway company acquired land belonging to a college and paid the purchase-money into court. Wigram, V.-C., allowed 400*l.* to be applied to a new purchase and 150*l.* to be paid in satisfaction of a charge on the lands, viz., the cost of making allotments under an inclosure Act: *Ex parte Queen's College, Cambridge* (1849), 14 Beav. 159, *n.*

(2) Under an inclosure Act, some lands were allotted to a rector, who had a power of selling to pay the expenses. Compensation money having been paid into court in respect of other lands of the rectory, the Court sanctioned the application of the money in court to the payment of the expenses of the inclosure: *In re Oxford, Worcester and Wolverhampton Ry., Ex parte Lockwood* (1852), 14 Beav. 158.

(3) A tenant for life had power, under the General Inclosure Act (8 & 9 Vict. c. 118, ss. 16, 133) to mortgage the inclosure for the purpose of meeting the expenses connected therewith, but had died without having done so:—*Held*, that the sums expended were a charge upon the allotments, and the deposited money might be applied by the trustee in paying those expenses: *Vernon v. Manvers (Earl)* (1862), 11 W. R. 133.

(v.) Purchase-money may also be applied in paying off charges for improvements on the land.

Illustration.

“If one looks at the 69th section of the Lands Clauses Act, it is obvious that the word ‘settle’ is used in a much looser and wider sense than in the Settled Land Act. As was pointed out in *In re Byron's Charity*, 23 Ch. D. 171, one of the ways in which the money may be applied is to the discharge of incumbrances ‘affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts or purposes.’ And it may be applied in the ‘purchase of other lands to be conveyed, limited and settled upon the like uses, trusts and purposes, and in the same manner as the land in respect of which such money shall have been paid stood settled.’ The word used is ‘settled,’ and if the present application had been made under

the Lands Clauses Consolidation Act for an investment of the fund in court in the purchase of land for the use of the vicar and his successors, that would have been a proper use of the money, and the land so bought would have stood settled to the like uses as the land taken by the railway company stood settled before it was so taken"; *per* Stirling, J., in *Ex parte Castle Bytham (Vicar)*, [1895] 1 Ch. at p. 355.

(vi.) Discharge of mortgage for a long term.

Illustration.

A mortgage of a long term is an incumbrance affecting the inheritance, and purchase-money of settled land can be applied in paying off the debt so secured: *In re Frewen, Frewen v. James* (1888), 32 Ch. D. 383.

(vii.) Mortgage affecting part only of the settled land.

Illustrations.

(1) Sect. 21 (2) of the Settled Land Act, 1882, permits the application of purchase-money to the discharge of incumbrances affecting the inheritance of the settled land sold or any other land which is the subject of the settlement: *In re Chaytor's Settled Estate Act* (1884), 25 Ch. D. 651.

(2) Settled land having been taken by a railway company and the purchase-money paid into court, the Court allowed the money so paid in to be applied towards the discharge of incumbrances on other parts of the settled land: *In re Dublin, Wicklow and Wexford Ry., Ex parte Richards* (1890), 25 L. R. 1r. 175.

(viii.) Terminable rent-charges may now, since the passing of the Settled Land Acts Amendment Act, 1887, be paid off out of moneys in court.

Illustrations.

(1) E. was tenant for life of settled estates, and borrowed money for the improvement of the estate, which was to be repaid by a terminable rent-charge:—*Held*, that purchase-money could be applied in payment off of the remaining principal secured by the rent-charges and a bonus to the lender as compensation for loss of interest caused by the redemption: *In re Lord Elmont's Settled Estates* (1890), 45 Ch. D. 395.

NOTE.—The decision of Kay, J., in *Re Lord Sudeley's Settled Estates* (1887), 37 Ch. D. 123, where he refused to allow the payment of interest, was disapproved of in the above case.

(2) The Settled Land Amendment Act, 1887, is not retrospective, and does not entitle a tenant for life to be recouped instalments of rent-charges paid by him before the Act came into operation; but he is entitled to have provision made out of capital moneys of the settlement, for the payment of the rent-charge so far as it remains unpaid from the time when the Act passed, even though the improved portions of the estate have been sold: *In re Howard's Settled Estates*, [1892] 2 Ch. 233.

(3) V., a tenant for life under a settlement, made an arrangement whereby rent-charges were transferred to a company, who accepted a lower rate of interest than that previously paid, and paid a bonus to the former holder of the rent-charges:—*Held*, that V. could not be recouped the payment of this bonus out of capital moneys of the settlement, as such

recoupment would not be expenditure in "redeeming" the rent-charges "or otherwise providing for the payment thereof": *In re Verney's Settled Estates*, [1898] 1 Ch. 508.

(ix.) Money in court may be applied in redeeming a quit rent.

Illustration.

Property of which S. was tenant for life sustained damage through the execution of works by the Public Works Commissioners. The property was subject to a yearly quit rent. Compensation was recovered for the damage done to the premises:—*Held*, that the quit rent was an incumbrance upon the property to the redemption of which the fund in court might rightly be applied: *In re Public Works Commissioners, Ex parte Studdert* (1856), 6 Ir. Ch. R. 53.

(x.) Money in court may be applied in the redemption of an annuity.

Illustration.

By a charter in the reign of James I. a grant was made of certain tithes issuing out of the rectory of St. Botolph Without, Aldgate, to persons named in the grant, their heirs and assigns. In 1804 by a marriage settlement it was provided that an annuity or clear yearly rent-charge of 640*l.* should issue and be payable out of the tithes in question for the term of 1,000 years. The tithes afterwards became vested in the trustees of a will, subject to the annuity created by the settlement. The trustees sold part of the tithes to certain railway companies for 30,670*l.* The tenant for life under the will contended that the trustees of the will might under sect. 33 of the Settled Land Act, 1882, invest or apply the 30,670*l.* as capital money arising under that Act:—*Held*, that the tithes were an incorporeal hereditament, and were therefore included in sect. 2, sub-sect. (10), of the Settled Land Act, 1882; *held also*, that the annuity created by the settlement was not a rent, because it did not issue out of a corporeal hereditament, but that it was an incumbrance on the tithes and an incumbrance affecting the inheritance within the meaning of the Settled Land Act, 1882, and therefore that the trustees might be at liberty to purchase the annuity with a view to its discharge: *In re Esdaile* (1886), 54 L. T. 637.

(xi.) Money in court may not, it seems, be applied in the redemption of a terminable tithe rent-charge.

Illustrations.

(1) L. was tenant for life of an advowson, compensation for which under the Irish Church Act, 1869, was awarded and lodged in court. On his petition, the infant tenant in tail not having been served nor being represented:—*Held*, that the fund might be invested in the purchase of tithe rent-charges on lands devised to the same uses as the advowson: *In re Church Temporalities Commissioners, Ex parte Leconfield (Lord)* (1874), 8 Ir. B. Eq. 559.

(2) T., the tenant for life of settled lands, had been awarded compensation for part of the lands taken by a railway company under their statutory powers. The Court refused permission to apply the fund to the redemption of a terminable tithe rent-charge under the Irish Church Act, 1869: *In re Dublin, Wicklow and Wexford Ry., Ex parte Tottenham* (1884), 13 L. R. Ir. 479; and see *In re Leinster's Estate*, 23 L. R. Ir. 152.

(xii.) Right of re-entry for rent unpaid under a lease is an "incumbrance."

Illustration.

A railway company served notice to treat upon the lessor and the occupier of certain property required. On March 17th, 1884, an award was made in respect of the lessor's interest and on November 7th, 1884, in respect of the lessee's interest, and notice was given by the company to the lessor that the company would pay all out-goings in respect of the leasehold interest after November 7th, 1884, and receive all profits. On that date rent was owing to the lessor, and notice to that effect was given to the company. The lessee had mortgaged his interest :—*Held*, that the right of re-entry was an incumbrance on the leasehold interest, and therefore on the fund in court representing it : *In re London Street, Greenwich, and London, Chatham and Dover Ry.* (1887), 57 L. T. 673.

(xiii.) A leasehold interest is an incumbrance.

Illustrations.

(1) A leasehold interest is an "incumbrance" within the meaning of this section (69) : *per Romilly, M.R.*, in *Ex parte Sheffield Corporation, In re Manchester, Sheffield and Lincolnshire Ry.* (1855), 21 Beav. 162.

(2) A petition was presented by a bishop that money paid into court for lands taken from the see might be applied in purchasing the lease of other land belonging to the see. This was allowed : *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14.

(3) Money was paid into court for lands belonging to the City Corporation which had been taken by several public bodies and companies. There was also money in court paid by the Corporation in respect of the leasehold interest in lands of which the Corporation was the reversioner in fee, the lands being required by them and authorised to be taken under the Holborn Valley Improvement Act :—*Held*, that the leasehold interest was an incumbrance within sect. 69, and the purchase-money for the leasehold interest was allowed to be paid out of the fund in court : *Ex parte London Corporation* (1868), L. R. 5 Eq. 418.

(4) A railway company having taken land forming part of a settled estate and paid the purchase-money into court, the tenant for life asked that part of the fund might be laid out in the purchase of the leasehold interest in certain cottages erected upon other parts of the settled land under building leases granted according to the settlement. This was allowed : *In re Townshend's (Marquis) Estates* [1882] W. N. 7.

(xiv.) Local improvement expenses charged on the land are "incumbrances."

Illustration.

Expenses incurred by a local authority in constructing new streets on settled land, and charged on the land, *held* to be an incumbrance affecting settled land payable out of capital moneys under sect. 21 (ii.) of the Settled Land Act, 1882 : *In re Legh's Settled Estate*, [1902] 2 Ch. 274.

(c) Money in court may be applied in the purchase of other land to be settled upon like uses.

(i.) What is "settled land."

(a) "Settled land" does not mean "in settlement."

Illustration.

"The word 'settled' [in sect. 69 of the Lands Clauses Act] does not mean 'in settlement' in the usual sense of the term, but it means simply 'standing limited.' It must mean that or it would not, in general, apply to the case of a corporation or of a married woman seised in her own right or of a trustee, guardian, or committee, or, in fact, to half the cases mentioned in the previous part of the section": *per* Jessel, M.R., in *Kelland v. Fulford* (1877), 6 Ch. D. at p. 494.

- (b) The word "settled" in this section must be read with sect. 32 of the Settled Land Act, 1882.

Illustrations.

(1) Land which was the absolute property of a charity was taken by a public body and the purchase-money paid into court under the Lands Clauses Act:—*Held*, that the word "settled" in sect. 69 of the Lands Clauses Act should be read with sect. 32 of the Settled Land Act, 1882, and hence the purchase-money could be dealt with under sect. 32 as being "money liable to be laid out in the purchase of land to be made subject to a settlement": *In re Byron's Charity* (1883), 23 Ch. D. 171.

(2) An award under an inclosure Act to "A. B. and his successors, vicars of X.," of lands in respect of glebe, is not an instrument limiting an estate or interest in land "to or in trust for any persons by way of succession" so as to constitute a "settlement" within the Settled Land Act; but the purchase-money in court of glebe lands comprised in such an award may, by the combined operation of sect. 32 of the Settled Land Act, 1882, and sect. 69 of the Lands Clauses Act, be dealt with as capital moneys under the Settled Land Act, and the Court has jurisdiction under the Settled Land Act, 1887, to authorise their application in the redemption of terminable rent-charges on the glebe created under the Land Improvement Act, 1864: *Ex parte Castle Bytham (Vicar)*, *In re Midland Ry.*, [1895] 1 Ch. 348; and see *Ex parte London Corporation*, 45 Sol. J. 259.

- (c) Two estates, notwithstanding the interposition of a term in one, may constitute one settled estate.

Illustration.

Four estates, A., B., C. and D., were devised by the same will in trust for the same tenant for life. After her death A., B. and C. were devised to different persons in strict settlement, and a long term of years was created in estate D., subject to which such estate was devised as to one moiety to the uses of estate A., and as to the other moiety to the uses of estate B. The trusts of the term were for the payment off of incumbrances on all four estates:—*Held* that, notwithstanding the interposition of the term of years, estate B. and one moiety of estate D. constituted one settled estate, and that capital moneys arising from the moiety of estate D. were applicable for improvements on estate B.: *In re Lord Stamford's Settled Estates* (1889), 43 Ch. D. 84. A similar decision was arrived at in *In re Freme, Freme v. Logan*, [1894] 1 Ch. 1. See also *In re Byng's Settled Estates*, [1892] 2 Ch. 219.

- (ii.) The option given in sect. 69 may be exercised by the Court or the person entitled.

Illustration.

A testator by his will gave a freehold messuage in trust for S. until he attained twenty-five. The messuage was subject (together with other property) to a perpetual rent-charge of 150*l.* per annum in favour of D., an infant, and her children in remainder. The property was taken under statutory powers, and the purchase-money paid into court and afterwards invested in reduced annuities. In 1870 S. attained twenty-five, and in 1871 contracted to purchase certain property for 1,100*l.* The trustee of the will petitioned that the purchase of the property for 1,100*l.* might be declared to be a proper one; that a conveyance of it to him in fee, subject to the annual rent-charge of 150*l.*, might be executed; that the 1,100*l.* might be raised out of the reduced annuities; and that the dividends on the balance thereof might be paid to S. The purchasers submitted that so much of the fund in court as would be necessary to purchase an annuity of the amount of the rent-charge should be so applied, and that the balance should be paid out to those entitled:—*Held* that, as to the reinvestment, the Lands Clauses Act gave an option either to the Court or to the persons entitled. If it was in the Court, the Court would order the reinvestment as prayed: *In re Dodd* (1871), 19 W. R. 741.

- (iii.) When money in court is to be laid out in lands to be settled to “like uses,” the Court will sanction an advantageous purchase beyond the amount of the sum in court, and may direct the additional costs to be paid out of the money in court.

Illustrations.

(1) Settled property was taken by a railway company and the purchase-money (2,200*l.*) paid into court. The trustees of the settlement contracted for the purchase of other messuages at a higher price than 2,200*l.*, and it was arranged that the heavier costs thus occasioned should be secured by a perpetual rent-charge on the newly-purchased property. The master disallowed the extra costs occasioned by the peculiarity of the contract as against the company, and the Court allowed these costs to be paid out of the money in court: *Ex parte Newton* (1841), 4 Y. & C. 518.

(2) The Court allowed a piece of land, purchased partly with money paid into court under the Lands Clauses Act for land, part of a settled estate, and partly with money added by the tenant for life, to be conveyed to the uses of the settlement, subject to a power given to the tenant for life of charging by will the property so purchased to the amount of the money added by him: *In re Jones' Settlement* (1864), 3 N. R. 632.

- (iv.) Mines and minerals under the land may be purchased: *Bellot v. Littler* (1874), 22 W. R. 836.
- (v.) Freehold ground-rents may be purchased: *In re Peyton's Settlement* (1869), L. R. 7 Eq. 463.
- (vi.) The reversion in fee of other leaseholds may be purchased: *In re Brasher's Trust* (1858), 6 W. R. 406, *post*, p. 380.
- (vii.) There must, except in special or unusual cases, be an investigation of the title to the land.

Illustrations.

(1) The Court refused to make an order that the lands might be conveyed without a reference to the master for investigation and approval of the title, in *Ex parte Craven, In re Cheltenham and Great Western Ry.* (1848), 17 L. J. Ch. 215.

(2) Upon a petition for the reinvestment of 50% paid into court under the Lands Clauses Act in land adjoining the settled property, the Court refused to dispense with the usual order of reference as to title, but gave leave to the parties to apply in chambers that the investigation of the title might be dispensed with: *In re Blomfield* (1876), 25 W. R. 37.

(viii.) The purchase-money of freeholds cannot, except in very rare cases, be invested in leaseholds.

Illustration.

Certain freehold and copyhold lands were taken by a railway company and the purchase-money paid into court. The parties entitled under the settlement comprising these lands were desirous that the money should be laid out in the purchase of a long leasehold interest for a term created in 1637 of 1,000 years, at a very small rent, and which the termor held without impeachment of waste:—*Held*, that this mode of investment was not permissible under the Act: *Ex parte Macaulay, In re Lancashire and Yorkshire Ry.* (1854) 23 L. J. Ch. 815.

Exceptional cases are such as the following:—

Illustrations.

(1) Land belonging to a college having been taken by a railway company, and the purchase-money paid into court, a petition was presented asking for the investment of part of the fund in the purchase of a brickfield, held for a term of which 977 years were unexpired, and which was adjacent to a college living, and thus to avoid the nuisance. This was allowed: *Ex parte Trinity College, Cambridge* (1868), 18 L. T. 849.

(2) A railway company under their statutory powers acquired a freehold chapel. There would have been great difficulty and expense in obtaining a freehold site in the neighbourhood:—*Held*, that the trustees might purchase a leasehold chapel at a price which was less than the actual value: *In re Rehoboth Chapel* (1874), 44 L. J. Ch. 375.

(ix.) (a) It seems that sect. 69 does not authorise the investment of the purchase-money of freeholds in copyhold property, but upon the report of a master that such an investment is fit and proper (*e.g.*, where all parties are *sui juris* and agree) and for the benefit of the persons interested (*e.g.*, in the case of infants or married women) the Court may sanction such an investment.

Illustrations.

(1) A testator devised a freehold estate to P, for life, with remainder to trustees on the usual trusts for sale. The property was taken by a railway company and the purchase-money paid into court. A reference was made to the master, on the petition of the

tenant for life to inquire whether it was fit and proper and for the benefit of the petitioner and the other parties interested that part of the purchase-money should be laid out in the purchase of certain freehold and copyhold land. The master reported that all the parties interested were ascertained and of age, but that two of them were married women; also that the proposed purchase was fit and proper and for the benefit of those interested. On this latter ground the Court sanctioned the proposed application of the money: *In re Cann's Estate and Norfolk Ry.* (1850), 19 L. J. Ch. 376.

(2) The purchase-money of land taken was paid into court by a railway company, and afterwards invested in Consols; 925*l.*, part of the Consols, were afterwards invested in land, and application was made to invest the balance (94*l.*) in a piece of copyhold land. It was ordered that inquiry should be made whether the proposed purchase was fit and proper and whether a good title could be made: *In re Blunt's Devises* (1854), 18 Jur. 742.

- (b) The purchase-money of copyhold land may be invested in the purchase of other copyhold land, or in effecting the enfranchisement of other copyhold land, which will be deemed equivalent to reinvestment in other lands.

Illustrations.

(1) Reinvestment with purchase of copyholds of inheritance was allowed where the land to be purchased was part of the same manor and the money to be invested was less than the purchase-money of the copyhold land sold to the railway company: *In re Browne and Oxford, Bletchingley Junction and Buckinghamshire Ry.* (1852), 6 Rail. Cas. 733.

(2) Land (part of which was copyhold) having been taken by a railway company and the purchase-money paid into court, a petition was presented by G., who was tenant for life with a special power of appointment among his children and grandchildren, for the payment out of the money and that it might be reinvested in the enfranchisement of the remaining copyholds. The purchase-money was 636*l.*; the sum requisite for enfranchisement was 1,049*l.* The petitioner proposed to make up the balance of the purchase-money and charge it on the inheritance. The Court allowed this application of the purchase-money: *In re Ground's Estate* (1852), 1 W. R. 32.

(3) Sect. 69 authorises the application of the purchase-money paid in respect of freehold land taken compulsorily to the enfranchisement of copyhold land settled upon the same trusts: *In re Cheshunt College* (1855), 3 W. R. 638.

(4) A railway company gave J. notice that they would require four and a half acres of copyhold land belonging to him. J. died before the purchase was completed, and an administration suit was commenced. The purchase-money was paid into court, and, after the master's report, an order was made permitting the application of the purchase-money to the enfranchisement of other copyhold land, part of J.'s estate: *Dixon v. Jackson* (1855), 25 L. J. Ch. 588.

(5) Copyhold land, vested in a vicar and certain trustees, having been taken under statutory powers, the purchase-money was paid into court. The vicar and the trustees afterwards entered into a contract for the purchase of other copyhold lands, and, upon petition, the sanction of the Court was given to this application of the money: *In re Eastern Counties Ry., Ex parte Vicar of Sawston* (1858), 27 L. J. Ch. 755.

- (x.) When the land taken is leasehold, the purchase-money may be invested in the purchase of the reversion in fee of other leaseholds, or in freehold or copyhold land.

Illustrations.

(1) C. by his will gave certain leasehold houses to his daughter Julia for her separate use for life, and, after her decease, to her issue living at her death as purchasers; but, if she left no issue living at her death, then to the testator's son William. C. died in 1832; William, his son, in 1833, intestate. Julia, after her father's death, married H. W. and had issue two children, who were infants at the date of the application mentioned below. In June, 1849, the houses were taken under statutory powers and 630*l.*, the amount of the purchase-money and compensation, were paid into court. Julia W. and her husband petitioned that the money might be reinvested in copyholds of inheritance, and this the Court allowed: *In re Coyte's Estate, In re Liverpool Dock Acts* (1851), 1 Sim. (N.S.) 202.

(2) A petition asked that 556*l.*, part of the produce of certain leasehold property taken under statutory powers, might be invested in the absolute reversion in fee simple of other leaseholds belonging to the same parties. The owners of the property were infants. The Court directed that the land purchased should be conveyed to a trustee in trust for the persons interested, their executors and administrators, until they should become of age, and then to them and their heirs: *In re Brasher's Trust* (1858), 6 W. R. 406.

(3) W. P. by his will bequeathed his leasehold messuages in N. Street, and ground-rents arising from leasehold messuages in E. Street, to his son W. P. for life, and after his death upon trust for all his children who should become of age. The property in E. Street was taken by a railway company, and the purchase-money, 330*l.*, was in 1852, upon the petition of W. P. junior, laid out in the purchase of certain leasehold property. In 1870 the N. Street leaseholds were taken by the same company and the purchase-money, 1,804*l.*, paid into the bank: 1,080*l.* were laid out, and, upon petition, the Court permitted the balance to be invested in freehold houses, the proposed reinvestment being substantially a settlement to the like uses: *In re Parker's Estate* (1872), L. R. 13 Eq. 495.

- (xi.) Purchase-money cannot be invested in the purchase of equity of redemption.

Illustrations.

(1) G. was tenant for life of leasehold lands, parts of which were taken by a railway company, and the purchase-money was paid into court. G. petitioned that the fund might be invested as part purchase-money of the reversion, subject to a mortgage for the remainder:—*Held*, that this would be an investment in the purchase of an equity of redemption, which was not authorised by sect. 69: *Ex parte Portadown, Dungannon and Omagh Junction Ry.* (1876), Ir. R. 10 Eq. 368.

(2) Purchase-money of settled land will not be authorised to be laid out in the purchase of a mere equity of redemption: *Radnor's (Earl) Settled Estates, In re* [1898] W. N. 174; (and see *Worman v. Worman* (1889), 43 Ch. D. 296.

- (xii.) Purchase-money may be invested, when the circumstances render it desirable, or when it is unobjectionable, in the purchase of land outside England.

Illustration.

Purchase-money of land was paid into court, and, upon the petition of the tenant for life, the Court allowed it to be reinvested in the purchase of land situate in the Isle of Man; *In re Taylor's Estate* (1871), 40 L. J. Ch. 454.

(d) Money in court may be expended in the erection of new buildings beneficial to the estate, also in additions to existing buildings and in substitution for such as have become ruinous.

The following cases show when such expenditure has been allowed :—

Illustrations.

- (1) New erections : *Ex parte Shaw* (1841), 4 Y. & C. 506.
- (2) Rebuilding farmhouse : *In re Wigan Glebe Act* (1854), 3 W. R. 41.
- (3) Building cottages : *In re Wight's Devised Estates* (1858), 6 W. R. 718.
- (4) New buildings : *In re Partington* (1862), 11 W. R. 160.
- (5) The erection of cottages on another part of the estate which was lying waste and unproductive : *In re Dummer* (1865), 2 De G. J. & S. 515.
- (6) A railway company, under statutory powers, took land (not built on) belonging to the Corporation of L., who were authorised by a local Act to erect offices for the transaction of their business, and to borrow on the security of the rates for that purpose :—*Held*, by Turner, L.J., that an application of the fund to the expenses of erecting the offices could only be allowed when there were special circumstances, showing such an application to be beneficial to all persons interested : *Ex parte Liverpool Corporation, In re London and North-Western Ry.* (1866), L. R. 1 Ch. 596.
- (7) Taking down certain trade buildings which had been rendered useless for trade purposes and erecting dwelling-houses on their site ; also in removing stackyard and roofing from buildings which by the railway works had been exposed to fire and rendered uninsurable : *In re Johnson's Settlements* (1869), L. R. 8 Eq. 348.
- (8) Building or rebuilding houses on an estate if it appears to be beneficial to the estate : *In re Leigh's Estate* (1871), L. R. 6 Ch. 887.
- (9) Rebuilding parsonage : *In re Hotham's (Lord) Trusts* (1871), L. R. 12 Eq. 76.
- (10) The erection of new buildings, but not mere repairs or permanent improvements, not placing new buildings on the land : *Drake v. Trefusis* (1875), L. R. 10 Ch. 364 ; considered in *Vine v. Raleigh*, [1891] 2 Ch. 13, *infra*.
- (11) Additions to a house which was part of the settled estate : *In re Speer* (1876), 3 Ch. D. 262.
- (12) D. was tenant for life under two settlements (which only differed in a remote contingency), one of lands, the other of personalty, which the trustees were directed to lay out in lands :—*Held*, that there was jurisdiction to make an order directing an advance to D. out of the personalty to re-erect a mansion-house on the land, and to set aside another sum out of the personalty for twenty years and to repay the advance out of the accumulated income : *Donaldson v. Donaldson* (1876), 3 Ch. D. 743.
- (13) The purchase and conversion of buildings into a dwelling-house for the pastor or chapel-keeper : *In re Lynington Baptist Chapel* [1877] W. N. 226.
- (14) Pulling down dilapidated houses and building artisans' dwellings : *Matthews v. Wilson* [1883] W. N. 111.

(15) Erection of two residences for the dean and tutor of a college : *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583.

(16) New cottages : *In re De Grey's Estate* (1887), 32 Sol. Jo. 108.

(17) The erection of new farm buildings and houses, draining, and the reconstruction of existing buildings : *Clarke v. Thornton* (1887), 35 Ch. D. 307.

NOTE.—The distinction between a trust to improve land and to purchase land is well settled. Under the former land cannot be purchased; under the latter it may not be improved, although a new house may be built, which is deemed to be acquiring land (*Drake v. Trefusis*, L. R. 10 Ch. 364) : *per* Chitty, J., in *Vine v. Raleigh*, [1891] 2 Ch. 13.

(18) Alteration, reconstruction and enlargement of mansion-house : *Re Walker's Settled Estate*, [1894] 1 Ch. 189.

(19) Mere structural repairs to a mansion-house, however extensive, does not constitute "rebuilding" within sect. 13, sub-sect. (iv.), of the Settled Land Act, 1890. There must be a present intention to let, if not an immediate prospect of letting, before the expenditure of capital money will be authorised in "additions to or alterations in buildings" under sub-sect. (ii.) of that section : *In re De Teissier's Settled Estates*, [1893] 1 Ch. 153; followed in *In re Lord de Tabley* [1896] W. N. 162; *Stanford v. Roberts*, [1901] 1 Ch. 440.

(e) Improvements.

- (i.) The following cases, which, for the most part, have arisen under the Settled Land Acts, illustrate the circumstances in which the Court will sanction the application of purchase or capital money to defraying the cost of permanent improvements on the land.

Illustrations.

(1) Improvements of schools : *In re Chelsea Waterworks, Ex parte Minister and Churchwardens of St. John's, Fulham* (1856), 28 L. T. (O.S.) 173.

(2) Erection of new farm house and buildings; the repair of old farm buildings; making new road; and draining large area of land : *In re Clitheroe's Settled Estates* (1869), 20 L. T. 6.

(3) Draining and erection of new buildings : *In re Leslie's Trusts* (1876), 2 Ch. D. 185.

(4) Providing larger and better supply of water to mansion-house : a new and improved system of drainage of the mansion-house; rebuilding stables, which were out of repair; the building of an agent's house : and the building of two cottages : *In re Houghton Estate* (1885), 30 Ch. D. 102; *but see* (12), *post*, p. 383.

(5) The Court refused to sanction expenditure for the erection of silos : *In re Broadwater Estate* (1885), 53 L. T. 745.

See now, however, Agricultural Holdings Act, 1900, Sched. 1.

(6) Construction of sea walls for improving the land for building purposes : *Re Bethlehém and Bridewell Hospitals* (1885), 30 Ch. D. 541.

(7) Providing additional supply of water to estate : *In re Bulwer Lytton's Will, In re Kneenworth Settled Estates* (1888), 38 Ch. D. 20.

(8) Costs of solicitor and surveyor of tenant for life in preparing and carrying out schemes for permanent improvement of settled land: *In re Earl of Stamford's Settled Estates* (1889), 43 Ch. D. 84.

(9) Erection of a new pumping engine and pumps for draining mines: *In re Mundy's Settled Estates*, [1891] 1 Ch. 399; followed in *In re Byng's Settled Estates*, [1892] 2 Ch. 219, and applied in *In re Eyre Coote*, *post*, p. 384.

(10) "In my opinion, though there were differences between the limitations of the will and the deed in the present case, there is nothing to prevent my saying that the two instruments constitute one settlement for the purpose of the question which is now before me, viz., whether capital money arising under the deed can be applied in paying the cost of improvements executed upon land comprised in the will to which capital money arising under the will would clearly be applicable. I can see no difficulty in this. . . . But before I can make any order it will be necessary that I should be satisfied that the proposed improvements are such as would be proper under both instruments": *per* North, J., in *In re Byng's Settled Estates*, [1892] 2 Ch. at p. 228.

NOTE.—The proposal made in this case was to expend 17,000*l.* upon repairs and improvements on the estate.

(11) Application of capital money to payment of *future* instalments of rent-charges payable by a tenant for life was not allowed in *In re Dalison's Settled Estate*, [1892] 3 Ch. 522; so also in *In re Marquis of Bristol's Settled Estates*, [1893] 3 Ch. 161.

(12) Building—(1) additions to the mansion-house, (2) a chapel for Roman Catholic service, (3) new stables, (4) a house for the residence of the estate agent, were *held* not to be improvements such as were authorised by the Settled Land Acts for the application of capital moneys. *In re Houghton Estate* (1885), 30 Ch. D. 102, so far as it sanctioned the application of capital moneys for the building of an agent's house, disapproved: *In re Gerard's (Lord) Settled Estate*, [1893] 3 Ch. 252.

NOTE.—In this case it was *held* that the question whether any particular application of capital money under the Settled Land Acts should be sanctioned by the Court must be determined entirely by the code of rules laid down in the Settled Land Acts, and not by reference to the decisions as to the application of purchase-money under the Lands Clauses Act.

(13) A new roof to a house—not of necessity the mansion-house—in the place of a worn-out one, and the re-arrangement of the main entrance, are "alterations" within the meaning of sect. 13 (ii.) of the Settled Land Act, 1890, and may, if reasonably necessary and proper, be properly paid for out of capital money; but the cost of erection of a heating apparatus and pipes was not allowed: *In re Gaskell's Settled Estates*, [1894] 1 Ch. 485.

(14) Part of a settled estate was sold to builders, who erected thereon a large number of houses. Upon another part, adjacent to the first, but not sold, a further number of houses had been erected, and, in order to properly develop the estate, a water supply for the estate and the neighbouring town of F. became essential. Water had been found upon land which formed part of the settled estate. The sanction of the Court was now asked to an agreement providing for the sale of this land, and of certain wayleaves and rights required for the water supply, to a proposed company. The agreement also provided that the builders should furnish two-thirds and the tenant for life one-third of the necessary working capital required by the company. The Court, having regard to sect. 25 (xiii.) of the Settled Land Act, 1882, gave its sanction to the proposed scheme for improving the estate: *In re Orwell Park Estate* [1894] W. N. 135.

(15) Sanitary work on leasehold houses was *held* payable out of capital money: *In re Lerer, Cordwell v. Lever*, [1897] 1 Ch. 32; and see *In re Thomas*, [1900] 1 Ch. 319.

(16) A tenant for life applied for an order that capital money arising from the sale of part of the Irish property might be applied in repaying sums laid out by him in improving the English part of the settled land by completing the works included in a scheme which had been prepared; an order was made as prayed: *In re Eyre Coote* [1899] W. N. 222.

(17) A local authority took, under statutory powers, certain land held for the purposes of a public park by a municipal corporation and paid the purchase-money into court:—*Held*, that the Court had power under sect. 32 of the Settled Land Act, 1882, to order the money to be paid out to the corporation to be applied by them to the permanent improvement of the park: *Ex parte London Corporation and Corporation of West Ham* (1901), 17 T. L. R. 232.

(18) Substitution of a new floor to keep out dry rot in the case of a house let in separate offices:—*Held*, to be an “alteration” within sect. 13 (ii.) of the Settled Land Act, 1890 (53 & 54 Vict. c. 69): *Stanford v. Roberts*, [1901] 1 Ch. 440.

(19) New farm buildings and a gardener’s cottage, but not stabling: *In re Lisburne’s (Earl) Settled Estates* [1901] W. N. 91.

(20) New drainage, and *semble* a bath and hot water: *Standing v. Gray*, [1902] 1 I. R. 49.

(21) An electric light instalment is not an “addition” to a mansion-house within sect. 13 (ii.) of the Settled Land Act, 1890 (53 & 54 Vict. c. 69): *In re Blugrave’s Settled Estates*, [1903] 1 Ch. 560; following *In re Clarke’s Settlement*, [1902] 2 Ch. 327; and overruling *In re Freake’s Settlement*, [1902] 1 Ch. 97.

NOTE.—The following are cases prior to the Settled Land Act, 1882, where capital money was allowed to be applied to the improvement of the estate or property:—

1. In altering and improving almshouses: *In re Buckinghamshire Ry.* (1850), 14 Jur. 1065.
2. In making drains: *In re Queen Camel (Vicar)* (1863), 11 W. R. 503.
3. In improving the water supply of property: *In re Lathropp’s Charity* (1866), L. R. 1 Eq. 467; *In re Croker’s Estate* [1877] W. N. 38.
4. In the erection of new buildings: *In re Newman’s Settled Estates* (1874), L. R. 9 Ch. 681.

But in the following cases it was *held* that the Court had no power to sanction the application of capital money to the construction of new drains and roads:—

1. *In re Belfast Water Commissioners* (1870), Ir. R. 5 Eq. 63.
2. *In re Venour’s Settled Estates*, *Venour v. Sellon* (1876), 2 Ch. D. 522.

(ii.) Orders for prospective application of future capital to improvements will not be made.

Illustrations.

(1) M., tenant for life, being desirous of selling the estate in building lots, wished to expend money in laying out roads and sewers. The trustees had no capital money in hand:—*Held*, that a prospective order authorising the trustees to incur this expense out of moneys to come in from the sale of lots could not be made, as the payment by trustees could only be sanctioned upon evidence that the work had been properly done, and that a certain sum of money was properly payable by the trustees in respect of it: *In re Millard’s Settled Estates*, [1893] 3 Ch. 116.

NOTE.—This case was distinguished in next case.

(2) "I am of opinion that if, after a proper scheme has been duly approved, the tenant for life, with the knowledge of the trustees, *bonâ fide* expends money for the purposes of and in accordance with this scheme, early expenditure being for the advantage of all parties interested, there is no prohibition to be found in the Act against the trustees, when they have capital money in their hands, adopting his expenditure and recouping him what he has actually spent, subject to the proper certificate being obtained": *per* Byrne, J., in *Re Duke of Norfolk's Parliamentary Estates, Duke of Norfolk v. Lord Herries*, [1900] 1 Ch. at p. 468. So *held*, distinguishing *In re Millard's Settled Estates*, *supra*. See also *In re Dalison's Settled Estate* and *In re Marquis of Bristol's Settled Estates*, *ante*.

- (iii.) If a tenant for life incurs expenditure without the expectation of getting it back, or upon his own responsibility, the Court will not reimburse him out of the fund in court.

Illustrations.

(1) A tenant for life of settled land petitioned for the application of purchase-money paid into court under an Act which incorporated the Lands Clauses Act, in reimbursing him for outlay made upon permanent improvements before the purchase was made or contemplated:—*Held*, that he had incurred the expenditure without expectation of getting it back, and could not take advantage of the money which had unexpectedly come in: *In re Stock's Devised Estates* (1880), 42 L. T. 46.

(2) Where a tenant for life of settled land has, prior to the Settled Land Act, 1882, created charges for land drainage and improvements under the Land Improvement Act, 1864, and other Acts, he will not be entitled under the Settled Land Act to have those charges paid out of the capital of the settled land so as to relieve him from the payment of the instalments: *In re Knatchbull's Settled Estates* (1884), 27 Ch. D. 349; 29 Ch. D. 588.

See now Settled Land Act, 1887, s. 1, which legalises such payments.

(3) With regard to the cost of improvements carried out after the date when the Settled Land Act, 1882, came into operation, sect. 15 of the Settled Land Act, 1890, is retrospective in its operation, and the Court has power to direct payment of same out of capital money, but with respect to the cost of those carried out before the Act of 1882 came into operation, even if sect. 15 of the Act of 1890 is retrospective (which is questionable), the Court has a discretion, and in the particular case the Court refused to order that the tenant for life should be repaid out of capital money sums which he had expended in improving the estate at a time when he was fully aware that, as the law then stood, capital money was not applicable to such a purpose: *In re Ormrod's Settled Estate*, [1892] 2 Ch. 318.

(f) Repairs.

- (i.) Ordinary repairs are not payable out of capital moneys—they must be borne out of income; but the Court may authorise an expenditure in the nature of repairs for the preservation of the trust estate, in cases amounting to salvage.

Illustrations.

(1) Where the tenant for life expended money in repairs and the permanent improvement of a mansion-house and of farm buildings, and also built additional rooms and a

conservatory to the mansion-house, the Court allowed the cost of new farm buildings and cottages, but not the cost of the other improvements or of the repairs: *In re Leigh's Estate* (1871), L. R. 6 Ch. 887.

(2) Under a will A. was tenant for life of a copyhold house and two leasehold houses. The latter having been taken under the Lands Clauses Act, the purchase-money was paid into court. The trustee entered into a contract in his own name for putting the copyhold house into proper repair at an estimated cost of 50*l.*, and there being no trust funds in hand out of which the expense could be defrayed, the Court, upon a petition for reinvestment presented by the tenant for life and the trustee, and without requiring service on the remaindermen, ordered the contract price of the repairs to be paid to the trustee out of the fund in court, and the remainder to be invested in Consols and the dividends paid to the trustee: *In re Aldred's Estate* (1882), 21 Ch. D. 228. Here the proposed expenditure was necessary to the preservation of the trust estate.

(3) C. devised his lands to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners, and an accumulation of surplus rents for twenty-one years from testator's death was directed. At the end of this period the surplus amounted to 37,000*l.* Repairs and improvements costing between 4,000*l.* and 5,000*l.* were necessary on the settled property:—*Held*, that the 37,000*l.* were capital moneys within the Act, and that so much of the expenditure as was for improvements within sect. 25 of the Settled Land Act, 1882, might be paid out of the fund, and so much as was for repairs out of income: *Clarke v. Thornton* (1887), 35 Ch. D. 307; see *In re Montagu*, [1897] 2 Ch. 8; *In re Partington*, [1902] 1 Ch. 711.

- (ii.) Where there is a right of re-entry or a statutory power of sale if repairs are not done, money in court may be applied for the purpose of repairs.

Illustrations.

(1) Where expenses had been incurred by a tenant for life under a will in reinstating structures on a portion of the devised property, in conformity with the provisions of the Metropolitan Building Act, which empowers the Commissioners to sell the structures if the owner neglects or refuses to pay the cost of reinstatement:—*Held*, that these expenses constituted a charge on the property, and that their repayment was a proper application of the proceeds of other lands devised to the same uses and taken under the Lands Clauses Act: *In re Davies' Estate*, *In re Crystal Palace and West End Ry.* (1858), 3 De G. & J. 144.

(2) Payment for drainage works for houses in a case where proceedings might have been taken against the trustees, who were the owners within the meaning of the Public Health Acts, was allowed to be paid out of capital moneys, such works not being repairs which the tenant for life was required under the testator's will to do: *In re Barney, Harrison v. Barney*, [1894] 3 Ch. 562; distinguished in *Re Thomas*, *infra*.

(3) The cost of reconstructing the drainage of leasehold houses forming part of a residuary estate bequeathed to trustees upon trust for a tenant for life and remaindermen *held* to be payable out of capital money, as an improvement within the meaning of the Settled Land Acts, notwithstanding a direction in the will that, pending a sale, the rents, after payment of "all incidental expenses and outgoings" were to be paid to the tenant for life: *In re Thomas, Weatherall v. Thomas*, [1900] 1 Ch. 319.

(g) The Court may, in certain cases, permit money in court to be applied to the erection of buildings in substitution.

Illustrations.

(1) A railway passed through a farm and divided it so that the buildings could not be conveniently used for one part of the farm :—*Held*, that it was an injury within the meaning of sect. 69 of the Lands Clauses Act, which required the substitution of other buildings, and that the compensation paid for the damage might be applied in the erection of new buildings upon that part of the farm which required them : *Ex parte Milward, In re Oxford, Worcester and Wolverhampton Ry.* (1859), 29 L. J. Ch. 245.

(2) The acquisition and preparation of houses for the temporary accommodation of the patients of a hospital, whose original buildings have been taken by a railway company, is a proper reinvestment within sects. 69 and 80 of the Lands Clauses Act : *In re St. Thomas's Hospital* (1863), 11 W. R. 1018.

(3) A railway company having taken settled land and paid in the compensation, made their railway, which caused certain trade buildings on the estate to become useless for trade purposes, and rendered certain agricultural buildings uninsurable against fire :—*Held*, that there were sufficient special circumstances to enable the Court to permit part of the fund to be expended in replacing the trade buildings by dwelling houses, removing a stack-yard, and roofing buildings with slate instead of thatch : *In re Johnson's Settlements* (1869), L. R. 8 Eq. 348.

NOTE.—Upon an application by the churchwardens and overseers of a parish to have a sum of money, which had been paid into court by a railway company for the purchase of certain buildings, applied to meet the cost of erecting other buildings in substitution for those taken, the Court declined to make an order without a reference to the master : *Ex parte Churchwardens of Bicester, In re Buckinghamshire Ry.* (1848), 5 Rail. Cas. 205.

(h) Purposes to which purchase-money of glebe or ecclesiastical land may be applied.

(i.) The Settled Land Acts do not apply to the sale of ecclesiastical property.

Illustrations.

(1) The fee simple of a burial ground was vested in the vicar and churchwardens, and the burial fees went to "the church trustees." The burial ground was closed by Order in Council. A railway company acquired part of the burial ground :—*Held*, that the purchase-money belonged to "the church trustees" : *In re St. Pancras Burial Ground* (1866), 15 W. R. 150.

(2) By an inclosure award lands were allotted to the vicar of C. and his successors as glebe. Part of the land was taken by a railway company and paid into court :—*Held*, under sect. 32 of the Settled Land Act, 1882, and sect. 69 of this Act, that the fund might be dealt with as capital money under the Settled Land Acts, and that the Settled Land Act, 1887, gave the Court jurisdiction to permit it to be applied to the redemption of terminable rent-charges on the glebe : *Ex parte Castle Bytham (Vicar), Ex parte Midland Ry.*, [1894] 1 Ch. 348. In this particular case, however, the Court declined to sanction the proposed application of the purchase-money in court to the redemption of a loan advanced for the improvement of the glebe lands.

(3) Certain houses had from time immemorial been granted for life to one of the prebendaries of W. by what was called a deed of "collation." The prebendary, with the approval of the bishop, applied for the appointment of trustees under the Settled Land

Act, with the object of selling the houses and investing the proceeds for the benefit of the prebendary, and those subsequently collated:—*Held*, that the Settled Land Act did not apply to the property, as it was ecclesiastical property: *In re Bath and Wells (Bishop)*, [1899] 2 Ch. 138.

- (ii.) The purchase-money of glebe lands or ecclesiastical land may be applied in improvements and in the purchase of other lands.

(a) Purchase of other land.

Illustrations.

(1) Land belonging to a vicarage was taken by a railway company and the purchase-money paid into court to the account of the vicar. Upon a petition by the vicar, stating an agreement to purchase land described in the agreement and that counsel had approved the title, and that the title-deeds had been examined and found correct, and praying for a conveyance and payment of the money out of court without a reference to a master, the Court made the order: *Ex parte East Dereham (Vicar)* (1852), 21 L. J. Ch. 677.

(2) The curate of B. petitioned for the approval by the Court of two contracts for the purchase of lands as a reinvestment of two sums of 539*l.* Consols and 4,414*l.* Consols in court. The former represented money paid into court for glebe land taken under statutory powers, the latter money arising from the granting of leases of land under a private Act, which required such money to be paid into court until proper purchases of land, to be approved by the Court, should be found:—*Held*, that the first fund should be applied to one only of the contracts, and that the railway company ought to pay—(a) half the costs of the petition, such costs not to exceed those of a summons adjourned to a judge in chambers; (b) a rateable proportion of the *ad valorem* stamp on the conveyance; and (c) a fourth part of the other costs of reinvestment under both contracts: *Ex parte Bilston (Perpetual Curate)* (1889), 37 W. R. 460.

(3) Portions of a churchyard were taken for the purpose of widening certain streets and the purchase-money was paid into court under sect. 84 of the Metropolitan Street Improvement Act. The petition of the vicar that a part of the money might be applied in the purchase, alteration, and repair of a house for a vicarage was granted: *Ex parte St. Botolph, Aldgate (Vicar)*, [1894] 3 Ch. 544.

(b) Improvements.

Illustrations.

(1) The building of a vicarage-house was allowed in *In re Whitfield (Incumbent)* (1861), 1 Jo. & H. 610.

NOTE.—To a similar effect, *Ex parte Claypole (Rector)* (1875) 11. R. 16 Eq. 574.

(2) A railway company took glebe lands and the purchase-money was invested in the usual way. A petition was then presented for the payment out of part. The purchase of a cottage, erection of farm buildings and executing repairs was allowed in *Ex parte Holywell (Rector)*, *In re Wisbech, St. Ives and Cambridge Ry.* (1865), 13 W. R. 960.

(3) Permanent improvements to parsonage-house sanctioned in *Ex parte Chelford (Perpetual Curate)* [1866] W. N. 163.

(4) Erection of farm buildings for the benefit of the rest of the glebe land was sanctioned in *Ex parte Shipton-under-Wychwood (Rector)* (1871), 19 W. R. 549.

(5) An application for recouping out of money in court, representing purchase-money of part of the glebe lands, a vicar the expenses incurred by him in repairing and improving the vicarage was refused in *In re Nether Stowey Vicarage* (1873), L. R. 17 Eq. 156.

(6) A sum of 80*l.* in court was directed to be appropriated towards the outlay still to be made in building new rectory-house in *Ex parte Hartington (Rector)* (1875), 23 W. R. 484.

(7) Money in court was ordered to be paid to the rector for the cost of erecting new rectory-house, subject to the approval of the bishop : *Ex parte Bradfield St. Claire (Rector)* (1875), 32 L. T. 248.

(8) Part of a fund in court, the proceeds of sale of a portion of glebe, was ordered to be paid to the rector towards recouping past outlay in building a farmhouse on the glebe : *Ex parte Gamston (Rector)* (1876), 1 Ch. D. 477.

(9) The proceeds of sale of glebe land were directed to be paid to the governors of Queen Anne's Bounty, to be applied by them in the building of cottages for labourers : *Ex parte Snailwell (Rector)*, Malins, V.-C., June 21, 1878, B. 1794, cited Seton on Decrees, 6th ed., p. 2441.

(10) A like order was made, upon evidence being produced to show that the buildings erected on the glebe constituted a permanent and valuable improvement, in *Ex parte Holywell-cum-Needingworth (Rector)* (1879), 27 W. R. 707.

(11) Money in court was ordered to be paid out to the parson, churchwardens and parishioners upon the production of the master's certificate that at least the amount had been spent in rebuilding the porch of the parish church : *Ex parte St. Alphage (Parson)* (1886), 55 L. T. 314.

- (iii.) Purchase-money in court representing glebe land taken cannot, it seems, be applied to the restoration of the chancel of the church or to pay off money borrowed from Queen Anne's Bounty.

Illustration.

Part of the proceeds of the sale of glebe land was ordered to be paid out to the rector towards recouping past outlay in building a farmhouse on the glebe ; but the application to apply other parts to the restoration of the chancel and in paying off money borrowed from Queen Anne's Bounty was refused in *In re Louth and East Coast Ry., Ex parte Grimoldby (Rector)* (1876), 2 Ch. D. 225. But *cf.* next case.

- (iv.) The Court may order money in court representing the purchase-money of a churchyard to be applied towards the repair of the chancel of the chapel and also towards payment of the rector's Parliamentary costs.

Illustration.

P., the rector of a parish, opposed a Bill in Parliament providing for powers to take the whole of the churchyard. An agreement was come to between P. and the promoters, whereby the latter took only a part of the churchyard and undertook to pay a certain

sum as compensation and to cover P.'s costs incurred in opposing the Bill. The Bill provided that this sum should be paid into court and dealt with as provided by sect. 9 of the Lands Clauses Act. The Bill was passed and the money paid into court. Upon an application by P., the Court allowed part of the money to be applied to the cost of repairing the chancel of the church and paying the rector's costs: *In re London County Council, Ex parte Pennington* (1901), 84 L. T. 808.

- (v.) Where rebuilding is necessitated by the dilapidated state of the buildings the rebuilding may be treated by the Court as repairs, and the money in court will not be applied to such rebuilding.

Illustrations.

(1) A railway company had taken part of the glebe of the rectory of W., and the price was fixed at 700*l*. The rectory-house was old and dilapidated: and, with the consent of the bishop and the patron, an arrangement was made for the rebuilding of the rectory-house, part of the money to be advanced by the Commissioners of Queen Anne's Bounty and part to be supplied by money agreed to be paid by the company for the glebe. The rebuilding proceeded, but the company was unable to pay, and the rector thereupon advanced the money and the building was completed. Afterwards the company paid the money, and the rector petitioned to have it paid out to him:—*Held*, that the Court could not make such an order: *Williams v. Aylesbury and Buckingham Ry.* (1874), L. R. 9 Ch. 684.

(2) In 1890 a rector rebuilt a rectory at a time when considerable repairs would otherwise have been necessary. In 1893 part of the glebe was acquired by the Manchester Ship Canal Co. and the purchase-money paid into court. A portion of the expenses of rebuilding the rectory was still unpaid. Upon a petition by the rector:—*Held*, that the sum remaining due could not be paid out of the fund in court: *Ex parte Rector of Newton Heath* (1896), 44 W. R. 645.

- (vi.) Money in court may not be used for the redemption of a terminable rent-charge, at any rate when the term is a short one.

Illustration.

The purchase-money of certain glebe lands, which were subject to a yearly rent-charge created by a former rector, and having eleven years to run, having been paid into court, the rector petitioned that part of the fund in court might be paid to the rent-charge holder in satisfaction of the remaining payments, and that the balance might be invested as cash under the control of the Court:—*Held* that, inasmuch as the future payments of the rent-charge would probably have to be borne by the petitioner, the Court ought not to disturb the existing state of things and allow the fund in court to be employed in anticipating such payments: *Ex parte the Rector of Kirksmeaton* (1882), 20 Ch. D. 203.

- (vii.) In exceptional circumstances part of the money was ordered to be paid to the rector as compensation for the inconvenience he had sustained by the works.

Illustration.

Part of the glebe of a rectory having been taken, and the purchase-money paid into court, the rector petitioned that, out of the fund, a sum might be paid to him as compensation for the injury and inconvenience sustained by him, owing to an alteration in

the fences and distribution of the glebe land having been rendered necessary by the works of the railway. The application was granted: *Ex parte Little Steeping (Rector)* (1848), 5 Rail. Cas. 207.

(k) Purchase-money of college land.

The effect of the Universities and College Estates Act, 1858, and the Universities and College Estates (Amendment) Act, 1880, is to provide, in the case of land belonging to a university or college taken compulsorily under the Lands Clauses Act, an additional mode of investment to those mentioned in sect. 69 of the last-mentioned Act.

Illustration.

Land belonging to a college was taken by a railway company and the purchase-money paid into court:—*Held*, that by sects. 2 and 4 of the Universities and College Estates (Amendment) Act, 1880, in conjunction with sects. 27 and 28 of the Universities and College Estates Act, 1858, such purchase-money might be applied, with the consent of the Board of Agriculture, in the erection of new buildings upon land belonging to the college and repaid into court by thirty equal annual instalments: *Ex parte King's College, Cambridge*, [1891] 1 Oh. 677.

VI. Payment out to party entitled.

NOTE.—In 1854 a description of the practice of the Court of Chancery in regard to petitions for reinvestment of money paid in under the Lands Clauses Act was given: see *In re Anon. or Blunt's Devises* (1853), 18 Jur. 742.

(a) Where a person is absolutely entitled, the money in court will be paid out to him.

Illustration.

In re Chelsea Waterworks (1887), 56 L. J. Ch. 640, *ante*, p. 363.

(b) When land is taken from persons under legal disability who are absolutely entitled, they will be entitled to a transfer of the purchase-money representing the land taken.

Illustration.

The Commissioners of Woods and Forests took real estate for public purposes from persons who were under legal disability and paid the purchase-money into court. The Court afterwards made an order for its investment, and directed the Commissioners to pay the cost thereof. The stock was afterwards transferred into court under 5 Vict. c. 7. Upon an application by the parties who would have been entitled to the real estate:—*Held*, that they were entitled to a transfer of the stock: *In re Robertson* (1857), 26 L. J. Ch. 349.

(c) If a person is absolutely entitled to part of the fund in court, that part will be paid out and the remainder will be ordered to be invested, but no apportionment of money can be directed under sect. 69.

Illustrations.

(1) Land was settled to uses such that A. and his son had between them the absolute beneficial interest. A railway took part of the land and paid the purchase-money in:—*Held*, that A. and his son were entitled to have part of the fund paid out to them and the remainder invested in land (to be settled to slightly different uses) at the expense of the company: *In re Jones's Trust Estate* (1870), 39 L. J. Ch. 190.

(2) R., a tenant for life without impeachment of waste, gave notice to a railway company of his intention to work the minerals under or adjacent to the railway. The parties afterwards came to an agreement for the sale of the minerals, and the purchase-money was paid into court. R. was forty-seven years of age, and now claimed the whole of the money on the ground that he would in all probability have been able to work out the whole of the minerals during his lifetime:—*Held*, that there was nothing in the Lands Clauses Act which entitled R. to the whole or any part of the money; that no apportionment could be directed under sect. 69; and that only the income should be paid to R. during his life: *In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

(d) If land is devised on trust eventually for sale with an option to a named person to purchase at a named price, that person is eventually entitled to the fund on paying the sum named by the testator.

Illustration.

Land was devised in trust for the testator's widow for life, and, after her death, for sale and division of the proceeds among his children equally, with a direction that the trustees should offer the land to the testator's son, at a price named, upon the death of the widow. The land was taken by a railway company under their powers, and the price paid for it was more than twice the price named:—*Held*, that the son was entitled to the whole amount upon paying the sum fixed by the testator: *In re Cant's Estate* (1859), 4 De G. & J. 503.

(e) Transfer to another fund is equivalent to payment out.

Illustrations.

(1) "This application is for the transfer of the fund from one account to another, that is, it is a payment out of court from one fund to pay it into another fund. In my opinion that is clearly a payment out of court": *per* Kindersley, V.-C., in *Melling v. Bird* (1853), 22 L. J. Ch. 599.

(2) The M. Board of Works served notice to treat for a house belonging to the estate of a lunatic, and a petition was presented by the committee asking that the master's report approving the sale might be confirmed; that the committee might be at liberty to convey; and that the purchase-money might be paid into court to the credit of the lunacy, and invested in 5 per cent. stock of the Great India Peninsular Railway. The Court approved the proposed investment, holding it to be advantageous to the lunatic; but directed the omission of the name of the board of works from the account, treating the proposed investment in railway stock as equivalent to a reinvestment in land, so as to free the board from all further obligation: *In re Buckingham* (1876), 2 Ch. D. 690.

(3) A municipal corporation, acting under statutory powers, took land forming part of the property of a free grammar school, and the purchase-money was paid into court

and invested. The trustees of the school then presented a petition asking for the transfer of the fund to the account of the Official Trustee of Charitable Funds :—*Held*, that this was equivalent to a petition for payment out of court: *In re Bristol Free Grammar School* (1878), 47 L. J. Ch. 317.

(f) Compensation for common lands taken.

- (i.) Compensation for rights of common is divisible amongst the copyholders and freeholders of the manor. Tenants of copyholders have no right to participate.

Illustration.

Part of the common lands of a manor was taken by a waterworks company, under statutory powers, and compensation for the rights of common paid to a committee of the copyholders :—*Held*, that the compensation was divisible among the copyhold tenants of the manor and the freeholders within the manor according to the stint fixed by the bye-laws: *Fox v. Amhurst* (1875), L. R. 20 Eq. 403. The occupiers of lands under the copyholders of a manor claimed, and by a bye-law were declared entitled to certain rights of common over the lands of a manor. Part of the lands had been sold to a railway, and the occupiers claimed to share in the purchase-money :—*Held*, that the claim could not be maintained. It could only be made by custom, by grant or prescription. There could be no such custom giving a *profit-à-prendre in alieno solo*; there was no grant, nor could there be a right by prescription, inasmuch as the claim would be against the owner of the land in respect of which the claim was made: *Austin v. Amhurst* (1877), 7 Ch. D. 689.

- (ii.) If freemen have the benefit of common land they are not entitled to the *corpus* of the purchase-money of the same, but it must be invested and the dividends paid to freemen for the time being.

Illustration.

Part of a certain freemen's common was taken by a railway company and the purchase-money paid into court :—*Held*, that the purchase-money was not distributable among the existing resident freemen, but that it ought to be invested in lands to be held to the same uses as the lands sold, and meanwhile invested and the dividends paid to the trustees and divided by them among the resident freemen at the same time or times as such freemen had been accustomed to enter upon the enjoyment of their rights of common: *Nash v. Coombes* (1868), L. R. 6 Eq. 51.

(g) Tenants in tail.

- (i.) Before money can be paid out to a tenant in tail it is necessary that a disentailing deed should be executed.

Illustrations.

(1) The G. S. and W. Railway Co. having purchased settled land, the tenant for life conveyed to them under their Act, and he and the tenant in tail applied to have the money paid out of court. No disentailing deed had been executed :—*Held*, that the money was to be considered as bound by the limitations affecting the land and to be dealt with as subject to be invested in lands to be settled to the same uses as the sold lands, and

that a disentailing deed was necessary to enable the parties to draw the money: *In re Great Southern and Western Ry., Ex parte Duke of Leinster* (1846), 9 Ir. Eq. R. 482.

(2) Two tenants in tail in gavelkind became entitled to a sum of 964*l.* and petitioned for payment out to them without executing a disentailing deed. Kindersley, V.-C., declined to make any order until a disentailing deed had been executed, the amount being over 200*l.*: *In re Tylden* (1863), 11 W. R. 869.

(3) M. was tenant in tail in possession of land. A railway company acquired part of the land and paid the purchase-money (380*l.*) into court. It was *held* that the money could be paid out to the tenant for life without requiring the execution of a disentailing deed: *In re Great Southern and Western Ry., Ex parte Maunsell* (1868), Ir. R. 2 Eq. 32.

(4) A fund in court representing land taken by a railway company under their compulsory powers will not be paid out to a tenant in tail without a disentailing deed having first been executed. So *held* by Lord Selborne, C., in *Re Butler's Will* (1873), L. R. 16 Eq. 479, declining to follow on the point, *In re South-Eastern Ry.* (1861), 30 Beav. 215, and *Nottley v. Palmer* (1865), L. R. 1 Eq. 241.

(5) The Court will not pay out funds, the produce of lands taken under statutory powers, to a tenant in tail in possession, or to a tenant for life and tenant in tail in remainder, without the production of a disentailing deed duly enrolled: *Ex parte Smyth, In re Limerick and Ennis Ry.* (1874), 10 Ir. R. Eq. 66.

(6) A fund in court representing land taken by a canal company under the powers of their special Act will not be paid out to a tenant in tail without a disentailing deed having been executed: *In re Norcop's Will* (1874), 31 L. T. 85.

(7) A disentailing deed is also necessary before the proceeds of sale of a settled estate sold under the Leases and Sales of Settled Estates Acts can be paid to a tenant in tail: *In re Broadwood's Settled Estates* (1875), 1 Ch. D. 438.

(8) A fund in court was not paid out except upon the production of a deed enlarging the base fee which had been created by a deceased tenant in tail: *In re Reynolds* (1876), 3 Ch. D. 61, following *In re Butler's Will* (*supra*).

(9) Lands which, under a will, were subject to an entail were sold under the Settled Estates Act, 1877, and the purchase-money paid into court and invested. The tenant for life and the remainderman executed a disentailing assurance assigning the money in court to a trustee upon such trusts as they should appoint, and discharging it of all trusts for reinvestment in land. They did not execute any appointment to themselves:—*Held*, that the money might be paid out without requiring the execution of any such appointment: *In re Winstanley's Settled Estates* (1886), 54 L. T. 840.

- (ii.) The Court, however, may dispense in certain cases (*e.g.*, when the fund is small) with the necessity of a disentailing deed being executed.

Illustrations.

(1) Part of an entailed estate was taken under statutory powers, and the purchase-money paid into court. The tenant in tail in possession petitioned for the payment of the money to him. No disentailing deed had been executed:—*Held* that, the money being of small amount, the order might be made: *Sowry v. Sowry* (1860), 8 W. R. 339.

(2) A fund which represented the interests of a tenant in tail in remainder taken by a railway company was ordered to be paid out to the tenant in tail in remainder with the

consent of the tenant for life without requiring a disentailing deed : *Ex parte London and North-Western Ry.*, *In re Holden* (1863), 1 H. & M. 445.

(3) The practice of dispensing with a disentailing deed on the payment out to a tenant in tail of a small sum paid in under the Lands Clauses Act, though apparently inconsistent with that Act, is now established by a series of authorities : *In re Watson* (1864), 4 N. R. 528.

(4) Land which was subject to an entail was taken by a railway company and the value paid into court. The Court directed it to be paid out to the tenant in tail in possession without the execution of a disentailing deed : *Ex parte Maunsell*, *In re Great Southern and Western Ry.* (1868), 2 Ir. R. Eq. 32.

(5) No disentailing deed need be produced on petition for payment out to the person who would have been tenant in tail of the land of purchase-money paid in under the Lands Clauses Act : *In re Row* (1874), L. R. 17 Eq. 300. "When a fund paid into court under the Lands Clauses Act is claimed on petition by a person who would have been the tenant in tail of the land represented by the fund, it is unnecessary for him to execute a disentailing deed as a condition of having the fund paid out to him" : *per* Malins, V.-C., 300, *ib.*

(6) No disentailing deed need be produced on a petition for payment out under the Leases and Sales of Settled Estates Act (rep. 40 & 41 Vict. c. 18) of a fund to a person who would have been tenant in tail of the land represented by the fund : *In re Wood's Settled Estates* (1875), L. R. 20 Eq. 372 ; *see*, however, *In re Broadwood's Settled Estates*, *ante*, p. 394.

(iii.) The disentailing deed must either be fully set out or made an exhibit to the petition for payment out.

Illustration.

A railway company having taken lands which were entailed, and paid the purchase-money into court under the Lands Clauses Act, it became necessary to execute a disentailing deed as to that portion, but it was made to include other and much larger properties. A petition was then presented to have the purchase-money paid out of court, and an abstract of the disentailing deed was set out in the petition and its execution proved by an attesting witness :—*Held*, that the deed must either be fully set out or made an exhibit to the affidavit accompanying the petition : *In re Field's Estate* (1863), 8 L. T. 722.

(h) Tenant for life.

(i.) A tenant for life is not entitled absolutely to a *solatium* paid for annoyance which the owner for the time being might suffer.

Illustration.

A railway company agreed to pay an owner, tenant for life, a sum of money for the benefit of him or other owners for the time being, to indemnify him from the cost of making a new road, &c., and as a *solatium* for the annoyance which the owner for the time being might experience from the construction of the railway ; and the company agreed to pay a further sum as the price of the land taken. Both sums were paid into court. The application of the tenant for life for the absolute payment to him of the former sum was

refused, the cost of the road, &c., being ordered to be paid out of it and the balance invested: *In re Marlborough's (Duke) Estate* (1849), 13 Jur. 738.

- (ii.) A small surplus of less than 20*l.* may be paid out to the tenant for life.

Illustrations.

(1) Where money had been paid into court in respect of lands taken by a railway company from persons who were under disability, and, except a small surplus, had been laid out in the purchase of lands to be settled to like uses, the surplus being less than 20*l.*, the Court allowed it to be paid to the tenant for life: *In re Bateman's Estate* (1852), 21 L. J. Ch. 691.

(2) Money was paid into court in respect of land taken by a company from the vicar of Sheffield and belonging to the benefice:—*Held*, that any balance not exceeding 20*l.* on the reinvestment of the fund might be paid to the vicar: *Ex parte Sheffield (Vicar)* (1904), 68 J. P. 313.

- (iii.) Mode of computation and terms of payment out to the tenant for life when leaseholds are taken.

Illustrations.

(1) On the death of the last *cestui que vie* of a renewable leasehold, the tenant for life, who had been in receipt of the whole income, and afterwards of the dividends of the compensation money paid by a railway company, was *held* entitled to the *corpus* of the compensation money, but without prejudice to any right of the remaindermen to relief in respect of the non-renewal of the lease according to the directions of the testator under whose will they and the tenant for life were entitled: *In re Beaufoy's Estate, In re Oxford, Worcester and Wolverhampton Ry.* (1852), 1 Sm. & G. 20.

(2) Where a railway company took leaseholds whereof one was tenant for life *in specie*, the Court directed that the invested purchase-money or so much as from time to time remained and the interest thereon should, in each year, be divided by the number of years which would have remained yet unexpired of the lease had it still existed, and that the amount of the quotient should be paid yearly to the tenant for life: *Littlewood v. Pattison* (1864), 10 Jur. (N.S.) 875.

(3) Leaseholds of which the petitioner was tenant for life under a marriage settlement were taken by the Corporation of S. At that time the leaseholds had eight years to run. The trustees of the settlement had power to sell the leaseholds with the consent of the tenant for life, but he declined to consent to their sale. The proceeds of sale were paid into court and invested, and it appeared that the purchase-money could produce annually for eight years a much larger amount than the leaseholds formerly produced:—*Held*, that the petitioner was entitled to receive an annuity of such an amount that the payment of it would exhaust the fund in eight years: *Askew v. Woodhead* (1880), 14 Ch. D. 27.

- (iv.) Rights of tenant for life and remaindermen in respect of compensation paid for minerals under settled land which have been taken.

Illustration.

The petitioner, who was tenant for life unimpeachable for waste, under settlement, being *bonâ fide* desirous of working the minerals lying under the surface of the M. Railway, gave notice of his intention so to do. The railway company had previously purchased the land without the minerals. Thereafter an agreement was arrived at between the petitioner and the company under which the company paid into court, as the value of the mines and minerals, 1,519*l.* The petitioner applied to have the whole of this amount paid out to him, on the ground that he would have worked out the minerals in his lifetime, as at the date of the notice he was only forty-seven years of age, and the minerals could, so the evidence showed, have been completely worked out in twenty years, and some of them in a much shorter time:—*Held*, that under sect. 69 no apportionment can be directed, that the petitioner was not entitled to any portion of the *corpus* of the fund in court, and that it must be invested and the income paid to the petitioner: *In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

(k) Mortgagee.

- (i.) The mortgagee is entitled to the amount assessed for goodwill of a business which passes with the premises, but not where the goodwill depends on the owner's personal skill.

Illustrations.

(1) A railway company gave notice to take part of certain business premises, and an award was made of 11,950*l.*, of which 2,800*l.* was awarded for loss of profits in carrying on the business. The executors of the mortgagor of the premises (into the possession whereof the mortgagees had entered upon the death of the mortgagor) claimed the 2,800*l.* as belonging to the mortgagor's estate:—*Held*, that the 2,800*l.* were in the nature of compensation for the value of the goodwill of the business, which passed with the premises, and that the whole of the 11,950*l.* belonged to the mortgagees: *Pile v. Pile, Ex parte Lambton* (1876), 3 Ch. D. 36.

(2) The rule that the goodwill of trade premises passes to a mortgagee does not apply to a case where the goodwill depends upon the owner's personal skill:—*Held*, therefore, that the sum awarded for trade damage and personal expenses to a mortgagor (a tailor by occupation) should be paid to him: *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472.

- (ii.) A mortgagee under an equitable mortgage is entitled only to six years' arrears of interest.

Illustration.

R. borrowed 400*l.* from J. on the security of an equitable mortgage by deposit of deeds, with a covenant to execute a legal mortgage. The mortgaged property was taken by a public body eighteen years later, and the purchase-money (1,050*l.*) paid in. No interest had ever been paid. J. petitioned for payment out to him of 400*l.* with interest:—*Held*, that J. could only have the 400*l.* with six years' interest paid out to him: *In re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713.

- (iii.) The company will become entitled to payment out of the money in court by obtaining a transfer of the mortgage on the property.

Illustration.

In October, 1856, two railway companies gave notice to F. M., the owner of certain land at Leigh, that they required part of his land, of which he claimed to be freeholder, subject to two mortgages to T. C. and W. A. H. They afterwards required another piece of land, and, inasmuch as the railway would divide the land from the house, he required them to make a communication. The companies offered to purchase the land so cut off, and ultimately did so. The deposit money was paid into court, and a jury having assessed the value at 383*l.*, that sum was paid into court, and the deposit paid out on the application of the company. The companies afterwards took an assignment, by the petitioner, of the two mortgages, and then presented a petition by the petitioner, their nominee, asking for payment out to them of the 383*l.* This was allowed: *In re Marriage, In re London, Tilbury and Southend Ry.* (1861), 9 W. R. 843.

(l) Married women.

- (i.) Right of dower. If the value of the right of dower is determined by the valuers, the dowress is absolutely entitled to have it paid out to her: otherwise she is entitled to one-third of the income from the purchase-money.

Illustrations.

(1) Real estate belonging to an infant, whose father had died, was taken by a railway company and the purchase-money was paid into court. A petition was presented by the infant's mother, who was entitled to dower out of the land. The Court made an order for investment of the fund in court and payment of one-third of the dividends to the mother in respect of her dower and the remaining two-thirds of the dividends to her as guardian of the infant: *In re Wilts, Somerset and Weymouth Ry., Ex parte Brewer* (1865), 2 Dr. & Sm. 552.

(2) Land belonging to an infant, subject to his mother's right of dower, was taken by a railway company and the purchase-money paid into Court:—*Held*, that the dowress was absolutely entitled to have the value of her right of dower, which had been separately assessed, paid to her out of the fund in court: *In re Hall's Estate* (1870), L. R. 9 Eq. 179.

- (ii.) When purchase-money in court belongs to a married woman, but is not her separate property under the Married Women's Property Acts or otherwise, the Court will allow it to be paid out only upon her separate examination and deed acknowledged, unless the amount of the fund is small, in which case the Court may, in its discretion, dispense with the separate examination or the deed of acknowledgment.

The principal cases on the subject of the examination of married women and acknowledgment of deeds are as follows:—

Ex parte Worthington (1853), 9 W. R. 769, *n.*;

In re Tyler's Estate (1860), 8 W. R. 540;

In re Hayes' Estate (1861), 9 W. R. 769;

Gibbons v. Kibbey (1861), 10 W. R. 55;

Pollock v. Birmingham, Wolverhampton and Stour Valley Ry., In re Clarke (1865), 13 W. R. 401 ;

Knapping v. Tomlinson (1870), 18 W. R. 684 ;

In re Belt's Estate (1877), 25 W. R. 901 ;

Standerling v. Hall (1879), 11 Ch. D. 652 ;

In re Robins' Estate (1879), 27 W. R. 705 ;

Frith v. Lewis [1881] W. N. 145 ;

Guest v. Neames [1884] W. N. 227 ;

Andrewes v. Tyrrell (1885), 29 Sol. Jo. 622 ;

In re Arabin's Trusts (1885), 52 L. T. 728 ; distinguished in *In re Ward's Estate, post*.

Tennent v. Welch (1888), 37 Ch. D. 622 ;

In re Drummond and Davie's Contract, [1891] 1 Ch. 524.

In re Ward's Settled Estates [1895] W. N. 41 ;

The Court will require an affidavit that the married woman has no settlement. The principal cases are as follows :—

Binford v. Bawden (1792), 2 Ves. 38 ; 2 R. R. 162 ;

Wallace v. Greenwood (1880), 16 Ch. D. 362.

But in case the amount is very small this affidavit may be dispensed with.

Illustration.

A fund in court was divisible into shares of less than 10*l.* on payment out :—*Held*, that in the case of a married woman the affidavit of no settlement might be dispensed with : *Veal v. Veal* (1867), L. R. 4 Eq. 115.

(m) Payment out to trustees.

- (i.) It seems that trustees who have a power of sale are included in the term “absolutely entitled.”

Illustrations.

(1) Stuart, V.-C., refused to make an order for payment to trustees in *In re Horwood's Estate* (1861), 3 Giff. 218.

(2) Payment out to a sole trustee was refused in the absence of persons interested : *In re Roberts* (1861), 9 W. R. 758.

(3) A devised real estate on trust for B. for life, with power of appointment by will, with remainder in default of appointment. The property was sold to a railway company and the purchase-money paid into court. B. appointed by will to trustees in trust for one of them for life and died. The Court ordered the money to be paid out to the trustees : *In re Illman's Will* (1870), 18 W. R. 962.

(4) *Semble* : Trustees for sale whose *cestuis que trust* are under disability are not persons “absolutely entitled” : *In re Reaston's Estate* (1872), L. R. 13 Eq. 564.

(5) Land was held on trust to sell as soon as the youngest of a class attained twenty-one and to distribute the proceeds. Before the youngest attained twenty-one part of the land was taken under compulsory powers and the purchase-money paid into court. After the youngest attained twenty-one some of the *cestuis que trust* and the trustees petitioned for payment out of the whole fund to the trustees or alternatively of the shares of the petitioners to them, leaving the remainder in court. An order was made for payment out of the shares of the petitioners, who agreed to this course :—*Held* that, as the petitioners did not object to the order, the company could not complain : *In re Soverly* (1873), L. R. 8 Ch. 736.

(6) A fund in court representing the purchase-money of leaseholds taken under compulsory powers was ordered to be paid out to trustees having a power of sale, the *cestui que trust* being an infant : *In re Gooch's Estate* (1876), 3 Ch. D. 742.

(7) Where purchase-money for land compulsorily taken has been paid into court it may be ordered to be paid out to trustees of a settlement and will, with a power of sale as persons "becoming absolutely entitled" : *In re Hobson's Trusts* (1878), 7 Ch. D. 708.

(8) Trustees of settled land had a power of sale at a future date. The land was taken by a vestry under the Metropolis Management Act, 1855, and the purchase-money paid into court :—*Held* that, as the trustees had been compelled to sell under the compulsory powers, they could give a receipt for the purchase-money as if the time for their power of sale had arrived, and the money must be paid out to them : *In re St. Luke's, Middlesex (Vestry)* [1880] W. N. 58.

(9) Trustees with a power of sale are persons "absolutely entitled" within the meaning of sect. 69 : *In re Thomas's Settlement* (1882), 30 W. R. 244.

(10) Trustees with a power of sale *held* to be persons who had become "absolutely entitled" : *In re London, Brighton and South Coast Ry., Ex parte Bowman* [1888] W. N. 179.

(11) Trustees for sale of lands compulsorily taken are not, either under the Lands Clauses Act or the Settled Land Act, 1882, s. 21, entitled as of right to payment out of the fund in court. Under the Settled Land Act the Court has a discretion to order such payment. Whether it has such discretion under the Lands Clauses Act, *quære*—*In re Hobson's Trusts (supra)* doubted : *In re Smith, Ex parte London and North-Western Ry.* (1888), 40 Ch. D. 386. "I think the words of sect. 69 point to a person who has become absolutely beneficially entitled to the money" : *per* Cotton, L.J., at p. 391, *ib.*

(12) Certain leasehold property was by deed assigned to trustees to be used for the purposes of a school, with power (subject to the consent of the bishop) to sell and give a discharge for the purchase-money. A municipal corporation, acting under statutory powers, agreed with the trustees for the purchase of the property, and paid the purchase-money into court to the credit of the vendors :—*Held* (following *In re Hobson's Trusts*, 7 Ch. D. 708), that the money in court might be paid out to the trustees as being persons "becoming absolutely entitled" within sect. 69 of the Lands Clauses Act, without the consent of the Charity Commissioners being first obtained : *In re Sheffield Corporation and St. William's Roman Catholic Schools* (1902), 72 L. J. Ch. 71.

NOTE.—By sect. 32 of the Settled Land Act, 1882, moneys paid into court under sect. 69 of the Lands Clauses Act may be applied as capital moneys arising under the Settled Land Act; and by sect. 14 of the Settled Land Act, 1890, "all or any part of any capital moneys paid into court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890."

- (ii.) Where some only of the beneficiaries have become absolutely entitled the Court will not order the whole fund to be paid out in order to avoid further petitions.

Illustration.

L. devised real estate to three trustees upon trust, as soon as his youngest son became of age, to sell it and divide the purchase-money equally among his children then living, and directed that the receipts of the trustees should be a good discharge. Before the youngest son attained his majority, part of the real estate was taken by a local board, acting under statutory powers, and the purchase-money paid into court. Upon the youngest son becoming of age, the estate became divisible into eight shares. A petition was presented by the trustees and the persons beneficially entitled to two of the shares asking that the sum of Consols might be sold and the proceeds paid to the trustees, or that two-eighths might be sold and the proceeds paid to those beneficially entitled thereto, and that the remaining money might be carried over to a separate account in favour of the other beneficiaries who did not join in the petition, and that the board might be ordered to pay the costs. The board asked that the whole fund might be paid to the trustees in order to save the costs of further petitions:—*Held*, that the board was not entitled to require the whole fund to be paid out at once: *In re Sowry* (1873) 29 L. T. 233.

NOTE.—In this case James, L.J., doubted whether the trustees were persons “absolutely entitled” within sect. 69.

- (iii.) When trustees have been constituted for the purposes of the Settled Land Acts, the Court may direct the money in court to be paid out to them.

Illustrations.

(1) E. settled lands in trust for his wife for life or until her second marriage, and in either event in trust for sale. The lands were taken by a railway company under sect. 7 of the Lands Clauses Act, and the purchase-money was paid in under sect. 69. On petition by the widow, an order was made for payment out to the trustees on their undertaking to hold the fund upon the trusts of the settlement: *In re Evans' Settlement* (1880) 14 Ch. D. 511.

(2) In a petition by the trustees of a settlement for payment out to them of a sum paid into court under the Lands Clauses Act, it appeared that the trustees had a power to sell, but no power to sell reserving the minerals; and as it was desired to effect a sale reserving the minerals, the sale had been effected by the tenant for life under sect. 7 of the Lands Clauses Act, and the question arose as to whether the Court had jurisdiction to make the order for payment out to the trustees under the Settled Land Act, 1882:—*Held*, that the Court had jurisdiction under sects. 22 and 32 of the Settled Land Act, 1882, to order money paid in upon a sale of land by the tenant for life under the Lands Clauses Act to be paid to the trustees of the settlement, the tenant for life consenting: *In re Rutland (Duke)* (1883), 49 L. T. 196.

(3) W. was tenant for life of lands, and also one of the two trustees. The lands were taken under statutory powers and the purchase-money paid into court. Both trustees were desirous of being discharged from their trusts:—*Held*, that two new trustees might be appointed for the purposes of the Settled Land Act and the fund paid out to them to be held on the trusts affecting the land sold: *In re Wright's Trusts* (1883), 24 Ch. D. 662.

A similar order was made in *In re Harrop's Trusts* (1883), 24 Ch. D. 717; and in *In re Wooton's Estate* [1890] W. N. 158.

(4) A fund in court represented the purchase-money of settled lands taken compulsorily:—*Held*, that an order could be made transferring the fund to the trustees of the settlement: *In re Rathmines, &c., Main Drainage Act* (1886), 15 L. R. Ir. 576.

(5) See also *In re Smith, Ex parte London and North-Western Ry.* (1888), 40 Ch. D. 386, *ante*, p. 400.

(6) Settled land which was subject to a joint power of appointment in the husband and wife was taken under statutory powers, and the husband and wife appointed the trust property to the children of the marriage, and a joint application was made by the husband, wife, children and trustees for payment out of court of the purchase-money to the trustees. An order was made appointing the trustees of the settlement trustees for the purposes of the Settled Land Act, and directing the fund to be paid out to them to be held upon the trusts of the settlement: *Ex parte Belfast Corporation*, [1898] 1 I. R. 1.

- (iv.) If the tenant for life exercising his option under sect. 22 (1) of the Settled Land Act, 1882, consents to payment into court it must remain in court, and will not be paid out to the trustees.

Illustration.

Where purchase-money had been paid into court with the consent of the tenant for life:—*Held* that, as the tenant for life had chosen or acquiesced in or consented to the payment in, he had exercised the option conferred on him by sect. 22 (1) of the Settled Land Act, 1882, and that he could not have the money paid out to the trustees to be held by them on the trusts of the settlement, but that the money must remain in court to be invested or applied under the direction of the Court: *Cookes v. Cookes* (1887), 34 Ch. D. 498.

NOTE.—There must be trustees in existence in order that a tenant for life may exercise his option under sect. 22 of the Settled Land Act, 1882.

Illustration to Note.

“The tenant for life, where there are trustees, has an option. He may then direct the purchaser to pay the money either to the trustees or into court; but I think it is obvious that the meaning of the option is that he may choose between the two, and that that option cannot properly be exercised, and cannot really be exercised at all, if there are no trustees: *per* Kay, J., in *Hatten v. Russell* (1888), 38 Ch. D. 334 at p. 345. And see *In re Fisher and Grazebrook* [1898] 2 Ch. 660.

- (v.) The fund in court representing the purchase-money of lands belonging to a charity, will not, it seems, be paid out to the trustees thereof without the consent of the Charity Commissioners unless the trustees have a full power of sale, or unless the charity is maintained partly by voluntary subscriptions.

NOTE:—But see *In re Smith, Ex parte London and North-Western Ry.*, 40 Ch. D. 386, *ante*, p. 400.

Illustrations.

(1) A petition for investment of purchase-money for land taken under statutory powers, and for payment of the dividends to the trustees of a charity, is not a pending matter

within the exceptions in sect. 17 of the Charitable Trusts Act, 1853, and the sanction of the Charity Commissioners must be obtained: *per* Kindersley, V.-C., in *In re Chelsea Waterworks and Skeat's Charity* (1855), 4 W. R. 28.

(2) Where a sum of money has been paid into court by a company on taking possession of lands belonging to a charity, before such money can be dealt with the consent of the Charity Commissioners to its application must be first given, unless the trustees have a full power of sale: *In re Faversham Charities* (1862), 5 L. T. 787.

(3) Purchase-money of charity property taken by a railway company was ordered to be paid to the trustees of the charity, apparently without the consent of the Charity Commissioners having been obtained: *Ex parte Tid St. Giles' Charity (Trustees)* (1869), 17 W. R. 758. A similar order was made in *In re Spurstowe's Charity* (1874), L. R. 18 Eq. 279.

(4) The trustees of a charity petitioned for the transfer of a fund to the official trustees of charitable funds, to be applied in part payment of the purchase-money of land purchased by the trustees of the charity with the sanction of the Charity Commissioners. Malins, V.-C., directed the transfer: *Ex parte Bishop Monk's Horfield Trust* (1881), 29 W. R. 462.

(5) A railway company took land belonging to a charity "without power of sale" and paid the purchase-money into court:—*Held*, that an order for payment out to the treasurer of the charity ought not to be made, but that the fund should be invested and the dividends paid to the treasurer: *In re Norfolk Clergy Governors* [1882] W. N. 53.

(6) A ward in the City of London purchased premises out of their common moneys, and by a deed of trust declared that they were held for the purpose of providing a watch-house and offices for the ward. The premises were subsequently let on lease. A railway company agreed to purchase the premises:—*Held*, that the premises were not held to charitable purposes so as to require the consent of the Charity Commissioners to the sale, nor for municipal purposes so as to require that of the Treasury; *held also*, that it was necessary that the sale should be completed under the Lands Clauses Act: *Finnis to Forbes* (No. 1) (1883), 24 Ch. D. 587.

(7) Land belonging to a company, as the governors of a charity, was taken by a railway company and the value, 1,000*l.*, paid into court. The part of the estate which remained in the possession of the company was let by them on a building lease, and the company had, out of money in their hands representing income of the charity, expended 1,000*l.* in enabling the builder to improve the lands comprised in the building lease by buying up certain rights over roads claimed by a neighbouring owner. This expenditure had been sanctioned by the Charity Commissioners, who also approved the present application although they gave no express consent, the money being under the control of the Court:—*Held*, that the Charity Commissioners had, in effect, authorised this outlay as capital expenditure, and that the company were entitled to have the money paid out as being absolutely entitled thereto: *Ex parte Haberdashers' Co.* (1886), 55 L. T. 758.

(8) Lands belonging to a charity were taken by various public bodies, under statutory powers, and the purchase-moneys paid into court. A petition was presented by the Charity Commissioners and the Official Trustees of Charitable Funds for the transfer of the fund to the Official Trustees of Charitable Lands. A scheme had been formulated, under an Act of Parliament, for the administration of the fund. Some of the amounts paid into court were under 1,000*l.* The application was granted: *In re St. Alban's, Wood Street* (1892), 66 L. T. 51.

(9) A railway company bought land from a charitable corporation, which was partly supported by voluntary contributions. The land had been purchased out of a fund arising from voluntary contributions towards the general purposes of the corporation :—*Held* that, as the contributions might lawfully be applied as income, the fund arising out of them was not subject to the jurisdiction of the Charity Commissioners ; and that by reason of its being invested it was not brought within that jurisdiction, and so the consent of the Commissioners was not necessary to the sale : *In re Clergy Orphan Corporation*, [1894] 3 Ch. 145.

See also *In re Sheffield Corporation and St. William's Roman Catholic Schools* (1902), 72 L. J. Ch. 71, *ante*, p. 400.

(10) A charity was founded by a deed enrolled under the Charitable Uses Act, 1735 (9 Geo. II. c. 36). A railway company, under their compulsory powers, purchased land belonging to the charity. It was *held* that the deed was not “ a scheme legally established within the meaning of sect. 29 of the Charitable Trusts Amendment Act, 1855 (18 & 19 Vict. c. 124), and therefore that the trustees could only sell with the approval of the Charity Commissioners, or with the authority of Parliament or of the Court : *In re Mason's Orphanage and London and North-Western Ry.*, [1896] 1 Ch. 596.

- (vi.) Money in court representing the purchase-money of land belonging to a college cannot be applied in the manner provided by sect. 2 of the Universities and College Estates (Amendment) Act, 1880, without the consent of the Board of Agriculture, which consent ought strictly to be evidenced by an order under the seal of the Board.

Illustration.

A petition was presented by the provost and scholars of King's College, Cambridge, asking that a fund in court representing the purchase-money of land belonging to the college which had been taken by a railway company might be applied towards the cost of some new buildings in course of erection at the college :—*Held*, that to such an application the consent of the Board of Agriculture was necessary : *Ex parte King's College, Cambridge*, [1891] 1 Ch. 333. “ I think that, strictly speaking, the consent of the Board ought to be evidenced by an order under their hands and seal, as mentioned in sect. 27 of the Act [the Universities and College Estates Act] of 1858. But as the Board appear by counsel and consent, I do not think I need require them to make such an order ” : *per North, J.*, at p. 680, *ib.*

(n) Company.

In certain cases payment out to the company has been directed.

Illustrations.

(1) A company took lands under their compulsory powers, and paid the sum awarded as purchase-money into court. F., the owner, was taking steps to set aside the award. The company petitioned for payment out to them. F. opposed the petition :—*Held*, that F. could not impeach the award and at the same time claim the protection under it given by the statute, and that the company were entitled to have the money paid out to them : *In re Fooks, In re Wilts, Somerset and Weymouth Ry.* (1849), 2 Mac. & G. 357.

(2) A sum of 171*l.* was lodged in court by a railway company under sect. 2 of the Railways (Ireland) Amendment Act, 1860; the arbitrator made his award and fixed the purchase-money at 171*l.* The company, with the consent of the owner and an incumbrancer, petitioned for payment out to the owner. The Court refused to do so, but ordered payment out to the company on their undertaking to apply the money in accordance with the consent: *In re Belfast Central Ry.* (1867), 1 Ir. L. T. 25.

(o) District council.

Illustration.

By an inclosure award in 1834 lands were allotted to the highway surveyor of a parish. In 1864 a railway company took the land under their compulsory powers and paid the money into court:—*Held*, that the money could be paid out to the district council, subject to the approval of the Local Government Board, as subject to this approval the council would be entitled to sell the land under sect. 1 of the Exhausted Parish Lands Act, 1876 (39 & 40 Vict. c. 62): *In re Brumby and Frodingham Urban District Council*, *In re Trent, Ancholme and Grimsby Ry.* (1904), 3 L. G. R. 258.

(p) Provisions of Settled Land Act, 1882, and amending Acts.

The Settled Land Act, 1882, provides as follows :

“2.—(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.”

“21. Capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorised object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) :

“(1) In investment in Government securities, or in other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities :

“(2) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :

“(3) In payment for any improvement authorised by this Act :

“(4) In payment for equality of exchange or partition of settled land :

“(5) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land :

“(6) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :

“(7) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land :

“(8) In purchase, either in fee simple, or for a term of sixty years or more, of mines or minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :

“(9) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :

“(10) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act :

“(11) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.”

“25. Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of those works or purposes (namely) :

“(i.) Drainage, including the straightening, widening, or deepening of drains, streams and watercourses :

“(ii.) Irrigation, warping :

- “(iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure :
- “(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water :
- “(v.) Groynes ; sea walls ; defence against water :
- “(vi.) Inclosing ; straightening of fences ; redivision of fields :
- “(vii.) Reclamation ; dry warping :
- “(viii.) Farm roads ; private roads ; roads or streets in villages or towns :
- “(ix.) Cleaning ; trenching ; planting :
- “(x.) Cottages for labourers, farm servants, and artisans, employed on the settled land or not :
- “(xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes :
- “(xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise :
- “(xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption :
- “(xiv.) Tramways ; railways ; canals ; docks :
- “(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes :
- “(xvi.) Markets and market places :
- “(xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land :
- “(xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid :
- “(xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines :
- “(xx.) Reconstruction, enlargement or improvement of any of those works.”

“ 26.—(1) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

“(2) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement on—

“(i.) A certificate of the Land Commissioners [Board of Agriculture] certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on

“(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

“(iii.) An order of the Court directing or authorising the trustees to so apply a specified portion of the capital money.

“(3) Where the capital money to be expended is in Court, then after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.”

“ 32. When, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit,

and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorized by this Act were authorized by the Act under which the money is in Court."

Sect. 1 of the Settled Land Acts (Amendment) Act, 1887, amends sect. 21 of the Act of 1882 as follows:—

"1. Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rent charge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent charge or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882."

The Settled Land Act, 1890, amends the Act of 1882 as follows:—

Sect. 25 of the Act of 1882—

"13. Improvements authorised by the Act of 1882 shall include the following (namely) :

"(i.) Bridges ;

"(ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let ;

"(iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof ;

"(iv.) The rebuilding of the principal mansion house on the settled land : Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land."

Sect. 26 of the Act of 1882—

"14. All or any part of any capital money paid into Court may, if the Court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890.

"15. The Court may, in any case where it appears proper, make an order directing or authorising capital money to be applied in or towards payment for any improvement authorised by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the Court."

The Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 74 (1) (b) amends sect. 25 of the Settled Lands Act, 1882, as follows:—

“ 74 (1) (b). The improvements on which capital may be expended, enumerated in section 25 of the said Act, and referred to in section 30 of the said Act [the Settled Land Act, 1882] shall, in addition to cottages for labourers, farm servants, and artisans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.”

70. Such Money may be so applied as afore-
said upon an Order of the Court of Chancery
in England or the Court of Exchequer in Ireland,
made on the Petition of the Party who would have been
entitled to the Rents and Profits of the Lands in respect of
which such Money shall have been deposited; and until the
Money can be so applied it may, upon the like Order, be
invested by the said Accountant General in the Purchase of
Three per Centum Consolidated or Three per Centum Reduced
Bank Annuities, or in Government or Real Securities, and the
Interest, Dividends, and annual Proceeds thereof paid to the
Party who would for the Time being have been entitled to the
Rents and Profits of the Lands.

Order for Applica-
tion and Invest-
ment meanwhile.

NOTE.—The words in italics were repealed by the Statute Law Revision Act, 1892.

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I. Order for application of moneys deposited as provided by sect. 69.**(a) Who is entitled to the rents and profits of the land.**

- (i.) The executor of a tenant *pur autre vie* is entitled to receive the income during the lifetime of the *cestui que vie* without a new order.

Illustration.

By an order made in 1827 part of the dividends of a fund in court was ordered to be paid to A. during the life of B. A. died in 1873 in the lifetime of B. :—*Held*, that under the Chancery Funds Rules, 1872, r. 22, the executor of A., although not named in the order, was entitled to have the future dividends paid to him without any fresh order being made: *Chapman v. Chapman* (1874), L. R. 17 Eq. 350.

NOTE.—The procedure is now regulated by the Supreme Court Funds Rules.

- (ii.) The legal personal representative, and not the residuary legatee, is entitled to accrued dividends.

Illustration.

Land which was limited to A. for life, remainder to B. in fee, was taken by a canal company under statutory powers. The purchase-money was paid into court and afterwards invested in Consols. The canal Act did not authorise the payment of any costs beyond those of the reinvestment of the purchase-money. A. died without having received any of the dividends. A's residuary legatee bequeathed all her residuary personalty to the petitioner, who prayed for payment to himself of the fund and the dividends. The legal personal representative of A. was not before the Court. The Court refused to pay to B. the dividends accrued during the life of A. and ordered them to be paid to A.'s personal representative. Application that the costs of the petition might be paid by the company also refused: *In re Ackers, In re Macclesfield Canal Act* (1862), 7 L. T. 525.

- (iii.) Where proceedings have been taken but the land has not been converted into personalty, the heir-at-law of the deceased owner dying intestate is entitled to the money in court (*ante* p. 366).

Illustration.

Land belonging to T., who was of unsound mind, but not so found by inquisition, was taken under the compulsory powers of the statute. The value of the land was assessed by two surveyors, one of whom purported to act on T.'s behalf, and the purchase-money was paid into Court. T. died intestate, being still of unsound mind:—*Held*, that there had been no conversion, and that T.'s heir took the fund: *In re Tugwell* (1884), 27 Ch. D. 309.

- (iv.) Upon the sale of part of a churchyard the rector for the time being is entitled to the dividends of the fund in court.

Illustrations.

(1) By a local Act land was directed to be purchased for use as a burial ground, and a body was constituted called the church trustees, consisting of the vicar, churchwardens,

and other parishioners. These trustees were to fix the amount of the burial fees, and when they amounted to 200*l.* at least, apply them to certain definite charitable purposes. The burial ground was afterwards ordered to be closed. A railway company at a later date took part of the ground, and the church trustees petitioned for the investment of the purchase-money to their account and payment of the dividends to them:—*Held*, that the Court had no jurisdiction under the Railway Acts to make the order as prayed, but it would seem that the Court might have made the order upon a proper scheme being formulated when all parties could be represented: *In re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173.

(2) A rector having the freehold of a churchyard, and having enjoyed the right to burial fees, is the person entitled, under sect. 70 of the Lands Clauses Act, to the receipt of the rents and profits. Hence, when a piece of land constituted by statute the churchyard of a parish, but which had been closed for burials under an Order in Council, was taken under the Lands Clauses Act, and the purchase-money paid into court, although the land at the time it was taken was wholly unproductive, either as to burial fees or otherwise:—*Held*, that whatever might be the ultimate destination of the *corpus* of the fund, the dividends, so long as it remained in court, must be paid to the rector of the parish for the time being: *Ex parte Liverpool (Rector)* (1870), L. R. 11 Eq. 15.

(3) By a special Act the rector and churchwardens and certain other persons were constituted trustees of, with power to enlarge, an existing churchyard. In 1849 a part of the land was taken by a railway company and the purchase-money paid into court. The burial ground was afterwards closed for burials:—*Held* that, inasmuch as the land was intended as an addition to the churchyard, the rights of the rector therein were the same as his rights in the old churchyard so far as they were not affected by the Act under which the land was purchased, and that he was entitled to the dividends on the fund in court so long as it remained there: *Ex parte St. Martin's Birmingham (Rector)* (1870), L. R. 11 Eq. 23.

(4) The plaintiff was rector of three parishes in the city of L., in the churchyards of which burials were prohibited by Order in Council. The defendants had statutory powers to acquire the whole of one and part of the other two churchyards upon making compensation. The land taken was partly for the formation of a new street and partly for the erection of buildings:—*Held* that, the plaintiff was entitled to compensation only for loss that he had sustained by being deprived of his interest in the churchyards, and not according to the value of the land to the defendants after its acquisition—in other words, the compensation was to be assessed with regard to the restricted mode of user of the land: *Stebbing v. Metropolitan Board of Works* (1870), L. R. 6 Q. B. 37.

(v.) If income is distributable by a vicar among certain poor persons, the vicar is entitled to receive the same.

Illustration.

The Accountant-General was directed to pay the income of a fund in court to the vicar of S. for the time being, the income being distributable under the terms of the will of G. P. among certain poor persons: *In re Pearce* (1857), 24 Beav. 491.

(b) Who is entitled to present petition for payment out of court.

(i.) When lands vested in the churchwardens and overseers of a parish are taken, the petition for reinvestment should be presented in their names.

Illustration.

Under the statute 59 Geo. III. c. 12, lands belonging to the parish were vested in churchwardens and overseers of the parish as a corporation. Therefore, where feoffees to charitable uses were empowered to sell and convey their lands to commissioners under an improvement Act :—*Held*, that the petition for the reinvestment of the purchase-money should be presented in the names of the churchwardens and overseers of the parish where the charity was established: *Ex parte Annesley* (1836), 2 Y. & C. Ex. 350.

- (ii.) Neither an incumbrancer, an annuitant, nor a remainderman is entitled to petition under sect. 70.

Illustrations.

(1) By a special Act, the purchase-money or compensation for property taken for the purposes of the Act was directed to be paid, in certain cases, into the bank and to be laid out in annuities ; and, until such bank annuities should be sold, and the money otherwise invested, the dividends were to be paid to the person or persons who would be entitled to the hereditaments if unsold. Provision was also made for the investment of money by the Court upon the application, by motion or petition, of the person making claim thereto. On the petition of an *annuitant* whose annuity was charged on the property with powers of distress and entry, and further secured by a term, for payment of his annuity and the arrears thereof out of a fund paid into court under the Act :—*Held*, that there was no power to proceed in a summary way on the petition of an *incumbrancer*, but only upon the application of the persons who would have been entitled to the property if unsold : *Ex parte Bach, In re St. Katherine Dock*, (1828) 2 Y. & J. 386 ; 31 R. R. 603.

(2) N. devised premises to M. for life, with remainder over to J., and appointed M. executor. J. brought an administration suit against M. ; M. contracted to sell the premises to a railway company, who paid the purchase money into court. J. petitioned that the money should be carried over to the cause of J. v. M. and invested ; that the interest might be paid to M. for life or until further order ; and that J.'s costs and those of all proper parties should be paid by the company :—*Held*, that J. as remainderman had no right to present such a petition ; that the money should be invested in the matter of the company's Act, the company to pay costs as on an ordinary petition by a tenant for life ; and that the remainder of the petition ought to be dismissed with costs : *Nash v. Nash* (1868), 37 L. J. Ch. 927.

- (c) Parties who should be served, &c. (see sect. 80).

II. Procedure and practice. (See also Daniell's Chancery Practice.)

- (a) Title of petition.

Illustration.

A petition presented under a local or special Act of Parliament, with which the Lands Clauses Act is incorporated, must be entitled "In the matter of" both Acts : *In re Clarke's Estate* (1864), 10 L. T. 366.

- (b) Reference to public statutes.

Illustration.

In a petition for the investment of money paid into court in respect of land taken by a company several sections of the Lands Clauses Act were set out at length. The Vice-Chancellor said it was improper to set out in a petition or other pleading a public statute ;

it was sufficient in all cases to refer to it : *In re Manchester and Leeds Ry., Ex parte Osbaldiston* (1849), 8 Hare, 31.

(c) Petition or summons.

- (i.) An application for payment or transfer out of court to a person absolutely entitled to a fund amounting to less than 1,000*l.*, paid into court under the Lands Clauses Act, is governed by rule 2, sub-sect. 2, of Ord. LV., and must be made by summons in chambers, not by petition ; and when a petition has been presented only the costs of a summons will be allowed, unless the circumstances are exceptional, or proceeding by petition is, in the circumstances, the better and cheaper method.

Illustrations.

(1) Two sums of 600*l.* and 801*l.* respectively having been paid into court by two railway companies, a petition was presented for payment out of the former sum and a summons for the payment out of the latter :—*Held*, that the general terms of sub-sect. 2 of Ord. LV., rule 2, are not to be construed as in any way qualified or modified by the sub-sections which follow it, and that the above-named applications should be made by summons in chambers, and not by petition : *Ex parte Maidstone and Ashford Ry., Ex parte Bala and Festiniog Ry.* (1883), 25 Ch. D. 168. “There is no distinction to be drawn between the nature of an application for payment out under the Lands Clauses Act and of a similar application under any other of the Acts specially mentioned” in rule 2 : *per* Chitty, J., at p. 172.

(2) An application was made for the payment or transfer out of court to a person absolutely entitled of a fund of less than 1,000*l.* :—*Held*, that such an application should be by summons, and not by petition. *In re Culton's Will* (1883), 25 Ch. D. 240.

(3) “The second sub-sect. of the rule [Order LV. rule 2, sub-sect. 2] applies to the payment to any person of cash not exceeding 1,000*l.* standing to the credit of any cause or matter in cases where no previous order of the Court has been made. So that if any person makes a statement and proves his right to cash standing in court, the sum not exceeding 1,000*l.*, he is entitled to have an order for payment on summons” : *Per* Bacon, V.-C., in *In re Madgwick* (1883), 25 Ch. D. at p. 372.

(4) Where an application by petition is cheaper and more expeditious than by summons, the Court will not disallow the costs of the petition although the proceeding falls within R.S.C. Ord. LV. rule 2, sub-rule 7, as business to be transacted in chambers. In such cases, however, the option of proceeding by petition or summons is at the applicant's risk. *In re Bethlehem and Bridewell Hospitals* (1885), 30 Ch. D. 541. “There are cases in which it is really much cheaper to apply by petition, and in such a case not to make an order, or to disallow the costs, would be monstrous. Cases where a petition is preferable are not unusual. For instance, I had a case before me where it took nearly six months to get the order in chambers, and I ascertained that the cost of that proceeding by summons far exceeded the costs that would have been incurred on petition” : *Per* Chitty, J. at p. 542, *ib.* (see also *In re Martin and Varlow* (1894), 43 W. R. 247, *infra*).

(5) The generality of rule 2, sub-sect. 1 of Ord. LV. is not modified by sub-sect. 5 ; hence, when a petition was presented under the Trustee Relief Acts asking for payment

out of a fund to a person whose title to the fund depended only upon proof of his birth, the sum involved being over 1,000*l.* in amount, but the whole matter being very simple :—*Held*, that the application ought to have been made by summons : *In re Broadwood* (1886), 55 L. J. Ch. 646.

(6) A piece of land was taken under statutory powers and the purchase-money, 362*l.*, paid into court. The tenant for life entered into a contract with a builder for the erection of two new cottages on the estate in substitution for the two taken. A petition was afterwards presented by the tenant for life, asking that the money in Court might be paid out, and that the company (purchasers) might pay the costs of the petition. The application was granted, and it was *held* that the procedure by petition was not, in the circumstances, improper, the costs not having been increased thereby : *In re Earl de Grey's Estate* [1887] W. N. 241.

(7) Where it appeared to the judge that there was no practical difference between the costs of a petition and the costs of a summons, no special direction as to costs was given : *In re Arnold* [1887] W. N. 122.

(8) Land belonging to a trust estate was taken under statutory powers and the purchase-money paid into court. The fund amounted to 2,100*l.* The trustee of the estate presented a petition asking that 1,330*l.*, part of the fund, might be paid to him, to be applied in converting a dwelling-house and two shops into three shops, and for investment of the balance of 770*l.* in three per cent. annuities :—*Held*, that the application did not come within Ord. LV. rule 2, sub-rule 7, and that a petition was rightly presented : *In re Hargreave's Trust, Ex parte Bradford Corporation* (1888), 58 L. T. 367.

(9) A petition was presented for the transfer of funds (of large amount) in court into the names of the Official Trustees of Charitable Funds. The funds had been paid into court by various public bodies in respect of charity lands situate in numerous parishes in the City of London, which lands had been taken under compulsory powers. The Charity Commissioners had made a scheme, under the City of London Parochial Charities Act, 1883, for the administration of the funds, and that scheme was binding upon the various corporations or public bodies, rectors, churchwardens, &c., in whose names the funds were standing. Some of the amounts in court were under 1,000*l.* :—*Held*, that the application was, nevertheless, rightly made by petition : *In re the Rector and Churchwardens of St. Alban's, Wood Street* (1892), 66 L. T. 51 (see *Att.-Gen. v. St. John's Hospital, Bath, infra*).

(10) Three railway companies had paid in purchase-money of lands belonging to a charity taken by them under their statutory powers. The funds amounted to 1,244*l.*, 44*l.*, and 36*l.* respectively. On a petition by the Official Trustees of Charitable Funds for transfer to them of the funds :—*Held*, that the two companies interested in the smaller funds should be limited to the costs they would have had to pay in case the application had been made by summons instead of by petition : *Att.-Gen. v. St. John's Hospital Bath*, [1893] 3 Ch. 151.

(11) Where an applicant proceeded by petition instead of by summons, only the costs that would have been incurred had the proceedings been initiated by summons were allowed : *In re Martin and Varlow* (1894), 43 W. R. 247.

(ii.) If the fund in court exceeds 1,000*l.*, even by the addition of accrued interest, the proper procedure for payment out is by petition, except in cases within (v.) p. 417.

Illustrations.

(1) Where the fund consisted of cash in court and securities, and the amount of cash and the nominal value of the securities together exceeded 1,000*l.*, it was *held* by Pearson, J., that, in the circumstances, the proper procedure was by petition: *In re Haworth* [1885] W. N. 48.

(2) A board of works took certain lands and paid the purchase-money, 1,000*l.*, into court. This sum was increased by the accrual of interest. Upon a petition for payment out, it was contended that the application ought to have been by summons, under sub-rule 2 of rule 2 of Ord. LV. :—*Held*, by North, J., that it was a proper case for presenting a petition: *Ex parte Finsbury and City of London Savings Bank (Trustees)* [1886] W. N. 150.

- (iii.) When a petition has been presented the Court can, in its discretion, order future applications to be made by summons in chambers.

Illustration.

Land belonging to a charity was taken by a railway company, and the purchase-money, 350*l.*, was paid into court. The feoffees of the charity entered into a provisional contract for the purchase of a small strip of land adjacent to their remaining property, and petitioned for payment out of part of the fund to pay for the land proposed to be purchased. The company was served with the petition. The Court made the order, and ordered the petition to be amended by asking that future applications as to the balance of the fund might be made by summons in chambers: *In re Lapworth Charity* [1879] W. N. 37.

- (iv.) An application for payment out of a share, amounting to less than 1,000*l.* of a fund exceeding 1,000*l.* in amount, cannot be made by summons.

Illustrations.

(1) A petition was presented by P., who was absolutely entitled to one-fifth part of a sum of 705*l.* paid into court as the purchase-money of property taken under statutory powers:—*Held*, that the presentation of a petition was, in the circumstances, a proper course, and the costs were allowed: *In re Clarke's Devisees* (1858), 6 W. R. 812 (this case was under the old practice).

(2) Upon an application for payment of money out of court, it was pointed out by Pearson, J., that under Ord. LV. rule 2 (2), applications for payment or transfer out of court could be made in chambers only when the total fund in court did not exceed 1,000*l.*, but that the application could not be made in chambers for payment out of a share, amounting to less than 1,000*l.*, of a fund in court which exceeded 1,000*l.*: *May v. Dowse* [1884] W. N. 122.

(3) Money had been paid into court by executors under the Trustee Relief Act to the credit of an account entitled "In the matter of the trusts of the sale moneys of certain real estate formerly belonging to E. deceased, and subject to the trusts of a certain royal warrant dated the 6th Aug. 1861." The fund had originally been about 1,500*l.* On an application by summons under Ord. LV., 600*l.* part of the fund, was ordered to be paid out, but as to the remainder the summons stood over for further evidence as to the death of an annuitant. The further evidence having been obtained, the application was

renewed. The summons asking for payment out of the balance to the applicant :—*Held*, that the case was not within Ord. LV. at all, and that the application ought to be made by petition, and not by summons : *In re Evans* (1886), 54 L. T. 527.

(4) A petition was presented for division into thirds of a fund in court exceeding 1,000*l.* in amount, and the carrying over of these thirds to separate accounts. There had been no order declaring the rights of the parties. The application was made, in the first instance, by summons, but, in the circumstances, there was no jurisdiction to make the order, and the chief clerk therefore declined to make one. A petition was thereupon presented :—*Held*, that the costs of the summons should be allowed, because it had been issued in the reasonable expectation that the order could be made in chambers, and it was a meritorious application. But such costs would not always be allowed in like circumstances : *In re Jellard's Trusts* [1888] W. N. 142.

- (v.) Where the case involves the construction of a will or other document, the application should be by petition; but where the rights of the parties have already been decided, or where there is no substantial difficulty in the matter, the application should be by summons, although the amount exceeds 1,000*l.*

Illustrations.

(1) The M. Board of Works, under statutory powers, took premises which were settled on F. for life, with remainder to A. and S. in moieties absolutely, subject as to A.'s moiety to life annuities. In 1866 the interests of F. A. and S. were agreed, and an order was made for payment to F. and S. of their interests. Part of A.'s share was ordered to be invested to satisfy the future annuities and the rest paid out. In 1868 one of the expectant annuitants died, and in 1869 F., the tenant for life, died. In 1870 an order was made on petition transferring to A. stock equivalent to one of the annuities. In 1883 another annuitant died, and A. applied by summons for payment out of so much of the sum invested as had sufficed to provide for this second annuity :—*Held*, that A.'s rights had been "declared" by the previous orders, and that the application, by virtue of Ord. LV. rule 2 (2) of the R. S. C., was rightly made by way of summons : *In re Brandram* (1883), 25 Ch. D. 366. Dissented from in *In re Rhodes* (Illustration No. 3, below), which latter case was doubted in *Bates v. Moore* (Illustration No. 4, below).

(2) Where an order had been made by a chief clerk in chambers for the transfer out of court of a fund exceeding 1,000*l.* to the account of an infant, upon proof of the identity of the applicant and that he had become of age the registrar declined to draw up the order, on the ground that, having regard to Ord. LV., rule 2 (4), he doubted whether there was jurisdiction to make the order in chambers. Pearson, J., made the order asked for on motion under the Legacy Duty Act (now repealed) : *In re Barker* [1884] W. N. p. 237.

(3) The trustees of a will paid into court under the Trustee Relief Acts a sum of 1,394*l.*, representing a share of the testator's residuary estate bequeathed in favour of the testator's son A. A summons was taken out by the administrator of A. for the payment out of the 1,394*l.* and interest :—*Held*, by Pearson, J., that the order could not be made upon a summons : *In re Rhodes* (1886), 31 Ch. D. 499. This case was doubted in *Bates v. Moore*, *infra*.

(4) A fund in court exceeding 1,000*l.* had been carried to the account of M., an infant. A petition for payment out was presented on M. attaining the age of twenty-one :—*Held*, that the application should not have been made by petition, as Ord. LV. rule 2 (1) prescribes no

limit of amount where the title to the fund “depends only upon proof of the identity or the birth, marriage, or death of any person”; *Bates v. Moore* (1888), 38 Ch. D. 381; *In re Rhodes* (*ante*) commented on.

(5) I. H. and W. H. claimed to be entitled under the will of W. H., deceased, to one-fifth of a sum of 2,437*l.* Consols in court, being the purchase-money of freehold land belonging to the testator, and they asked for payment out to them. The title of the applicants depended on the proof of their identity and age, and on the deaths of the testator's widow and of the applicants' father. There was also a question upon the construction of the will. The application was first made by summons in chambers, but Kekewich, J., held that he had not jurisdiction under Ord. LV. rule 2, sub-sect. 1, to deal with the matter in chambers. A petition was thereupon presented:—*Held*, that Ord. LV. rule 2, sub-sect. 1, did not contemplate such a case as the present when there was a question of construction involved, nor was it a case in which the matter could be heard on summons by the judge under the discretion of the judge given by sub-sect. 18 of the same rule, and that therefore a petition was necessary: *In re Hicks, Ex parte North-Eastern Ry.* (1894), 70 L. T. 529.

(6) A petition was presented for payment out of part of a fund exceeding 1,000*l.*, which had been paid in by a railway company under the Lands Clauses Act, and for transfer of the rest to the credit of an action. An order had previously been made declaring the rights of the parties:—*Held* that, under Ord. LV. rule 2 (1), of the R. S. C., there was no difference between an application for payment out or transfer to a person and one for transfer to the credit of an action; that the application should have been by way of summons; and that the company's liability for costs should not exceed that on a summons adjourned to a judge in chambers and attended by counsel: *In re Lancashire and Yorkshire Ry., Slater v. Slater* (1895), 64 L. J. Ch. 688.

(7) J. B. bequeathed the residue of his personal estate in trust for his son W. H. B. on attaining twenty-one. Cash and securities to the value of 5,000*l.* had been carried to the credit of a separate account entitled “residuary estate of J. B., deceased.” W. H. B. had attained twenty-one, and now petitioned for payment out of the fund to him. It was suggested that the application should have been by summons in chambers, but Farwell, J., made the order on the petition, and said that Ord. LV. rule 2 (1), only applied to cases where the fund was carried over to the separate account of a particular person: *In re Birkin* [1901] W. N. 33.

- (vi.) Applications for interim and permanent investment and for payment of dividends. The course of procedure prescribed by Ord. LV. rule 2 (7), supersedes that directed in the Lands Clauses Act (see *Ex parte London Corporation* (1883), 25 Ch. D. 384).

Illustrations.

(1) The master and fellows of a college applied by petition that funds in court amounting to about 7,000*l.*, and representing the purchase-moneys of lands belonging to the college and taken by a railway company under statutory powers, might be paid to the applicants, they undertaking to apply it in building two residences as an addition to the college:—*Held*, that the application was not an “application for interim and permanent investment and for payment of dividends” within Ord. LV. rule 2, sub-sect. 7, and might be made by petition: *Ex parte Jesus College, Cambridge* (1884), 50 L. T. 583.

(2) The Metropolitan Board of Works took, under statutory powers, the lands of a charity and paid the purchase-money into court. The trustees then petitioned that the fund might be invested in Consols, and when so invested carried over to the account of the Official Trustee of Charitable Funds, and that the dividends might be paid to the treasurer for

the time being of the charity. The title to the lands sold had been approved by the purchasers, but the conveyance to the Board of Works had not yet been executed. Hence the legal estate remained vested in the Official Trustee of Charity Lands under the scheme. The Official Trustee of Charity Lands and Charitable Funds was served with the petition and a question arose whether his costs should be paid by the Board of Works. Another question was whether the application should have been by petition or summons:—*Held*, that an order ought to be made as asked and that a petition was justifiable, and that the Official Trustee was rightly served: *In re Stafford's Charity* (1887), 57 L. T. 846.

(3) Money in court representing the value of settled land taken was ordered to be invested and the income paid to J. for his life. Upon J.'s death, an application was made by summons in chambers for the payment of the income to the trustees of the will. The chief clerk thought the matter ought to be dealt with on petition. The Court *held*, upon petition, that the corporation concerned must pay the costs of the petition: *In re Jackson* [1894] W. N. 50.

(vii.) An application that is in effect to vary an order made on petition must be made by petition, and not by summons.

Illustration.

Where an order had been made upon a petition for investment of a sum of 3,968*l.*, and it was afterwards found that a further sum of 375*l.* was needed, objection was made that the investment of the 375*l.* ought to have been obtained by summons. It was, however, *held* that the application was, in effect, to vary an order made on petition and could not be properly made by summons, and the costs of both petitions were ordered to be paid to the applicants: *In re Sanders* (1894), 70 L. T. 755.

(d) Unnecessary petitions should not be presented, but matters where possible should be consolidated in one petition.

Illustrations.

(1) When the purchase-money of lands taken by a railway company was invested in land sold in another suit in the court, a second petition, intitled in the cause, became necessary, and the company had to bear the expense of both petitions: *Carpmael v. Profitt* (1853), 17 Jur. 875.

(2) The purchase-moneys of lands belonging to a corporation and taken by two different companies were paid into court. They were ordered to be paid out upon one petition, the costs being apportioned: *In re Manchester, Sheffield and Lincolnshire Ry., Ex parte Sheffield Corporation* (1855), 21 Beav. 162.

(3) The same persons were entitled to two funds in court, which had been paid in under the Lands Clauses Act by a railway company. The titles to the two funds were different, and there were separate sets of trustees. Two petitions were presented:—*Held*, that the statements in the two petitions should have been included in one: *In re Pattison's Estates* (1876), 4 Ch. D. 207.

(e) On a petition asking for the reinvestment of the purchase-money of lands held to charitable uses, an order may be made without the consent of the Charity Commissioners being first obtained, unless the

matter in question relates to the constitution and foundation of the charity, or the trustees had, in the particular case, no power to sell and convey.

Illustrations.

(1) There being two sets of trustees, one of freeholds and the other of copyholds, settled to the same trusts, the freeholds were sold to a company under the Lands Clauses Act:—*Held* that, on an application for the investment of the proceeds in procuring the enfranchisement of the copyholders, the Court had jurisdiction to make an order without the previous consent of the Charity Commissioners to the application: *In re Cheshunt College* (1854), 1 Jur. (N.S.) 995.

(2) Land belonging to Lister's Hospital had been taken by a railway company and the purchase-money paid into court under the Lands Clauses Act. A petition was presented asking that a part of the purchase-money might be laid out in the purchase of other land; another part applied to the redemption of land tax; and the balance paid to the trustees for the general use of the charity:—*Held*, by the Court of Appeal, adopting the view of Wood, V.-C., in *In re Cheshunt College* (1855), 1 Jur. (N.S.) 995, that the sanction of the Charity Commissioners to such an application was unnecessary: *In re Lister's Hospital* (1855), 6 De G. M. & G. 184.

(3) At the conclusion of peace in 1815 a volunteer corps was disbanded, and a fund subscribed for the purposes of the corps was reserved to trustees to assist, at any future time, in fitting out a similar corps, and, in the meantime, that the income should be applied for the benefit of the members, if living, or of their families, if dead, who might need assistance. In 1857 the fund was paid into court, and a petition was presented by the rectors of two parishes, who were *ex-officio* vestrymen, praying that the persons entitled might be ascertained and a scheme directed:—*Held*, by Romilly, M.R., following *In re Lister's Hospital*, 6 De G. M. & G. 184, that the Court could deal with the matter and direct a scheme without the consent of the Charity Commissioners: *In re St. Giles', Bloomsbury, Volunteer Corps* (1858), 25 Beav. 313.

(4) Land which was vested in trustees for charitable purposes was taken by a railway company, and the purchase-money paid into court. Upon a petition for the transfer of the money, when invested, to three of the trustees:—*Held*, by Wood, V.-C., that as the trustees had no power of sale, the funds could not be transferred into their names without the consent of the Charity Commissioners, but that the petitioners might take an order to invest the money and pay the dividends to the three trustees, or the petition might stand over until an application to the Charity Commissioners had been made: *In re Faversham Charities* (1862), 10 W. R. 291.

(5) K. gave personalty on trust to establish and support a school and for the maintenance and education of boys, preference being given to lineal descendants of K.'s grandfather. Three of these lineal descendants filed a bill praying for the administration of the estate and asking that proper provision might be made for their maintenance and education:—*Held*, that the action was not maintainable without the previous consent of the Charity Commissioners: *Braund v. Deron (Earl)*, 1868, L. R. 3 Ch. 800. "It appears to me that the case of *In re Lister's Hospital* is manifestly distinguishable from this. The Court there agreed with the view which I had taken in a previous case, namely, that a petition of that nature did not deal with the charity *quâ* charity; but there being already a well-constituted charity and a pending matter, namely, the payment of money into court, which was necessarily applicable to lands to be held upon the same uses, the petition was not an original petition to regulate the charity itself, but was simply for the purpose of doing that which the common order and forms of the Court would require to be done, namely, to invest a sum of money which had to be invested as

if in the case of an ordinary settlement. That seemed to me not to come within the purview of the Act. But here, if there be any one thing more plain than another, it is that these persons cannot have any benefit until the charity is established by the fund being appropriated for this purpose:" *per* Page Wood, L.J., at p. 806, *ib.*

See also sect. 69, *ante*, p. 402.

(6) The property of a charity was vested in trustees, who administered it according to a scheme made by the Charity Commissioners. Part of the property was taken under statutory powers and the purchase-money paid into court. Upon a petition by the trustees for the reinvestment in land of the money in court:—*Held*, that an order could be made on the petition without the consent of the Charity Commissioners: *In re William of Kyngeston Charity* (1881), 30 W. R. 78.

(f) Form of order (*see* Seton on Judgments).

(i.) As to investment of moneys in court in real securities.

Illustrations.

(1) "It is ordered that it be referred to the master of this court, in rotation, to inquire and state to the Court whether it will be fit and proper and for the benefit of the parties interested under the indentures of lease and release dated respectively the 1st and 2nd days of March, 1830, and under the will of F. E. F., in the petition named, dated the 10th day of March, 1842, that the sum of 4,500*l.*, part of 5,500*l.* cash, part of the sum of 10,047*l.* cash in the bank to the credit of the G. N. Railway Co., should be laid out at interest on the security of the real estate in the petition mentioned; and, if so, whether a good title can be made to the estate comprised in the said proposed security, and in whose name or names the said security shall be taken" (investment directed, in the meantime, in stock): *In re Franklyn's Settlement* (1848), 1 De G. & Sm. 528.

(2) A local authority took some settled land and paid the purchase-money into court. "The 70th section [of the Lands Clauses Act] distinctly provides for temporary investment in real securities, and such an investment is perfectly proper if the security is such as the Court approves. There must be an inquiry as to the sufficiency of the security, and if it is found sufficient the order must be made": *per* Malins, V.-C., in *In re Smith's Estate*, L. R. 9 Eq. at p. 179.

(ii.) As to payment out.

Illustrations.

(1) Money assessed by a jury for land taken was paid into court and invested in Consols. On a petition by the tenant for life and two of his annuitants (not bound by the contract) for payment of the dividends to the former, the order was made as prayed, prefaced with an undertaking by the annuitants not to distrain on any part of the land in the contract: *In re Pedley's Estate*, *In re London and Tilbury Ry.* (1855), 1 Jur. (N.S.) 654.

(2) Where land belonging to a college, which was subject to a lease, was taken by a public authority and the purchase-money paid into Court:—*Held* that, during the continuance of the lease, the college was entitled only to so much of the dividends as was equal to the rent, and that the rest of the dividends must be accumulated until the expiry of the term: *Ex parte Merton College (Warden)* (1862), 1 N. R. 176.

(iii.) Continuing orders as to payment of dividends.

Trustees.

Illustrations.

(1) A part of certain lands which had been vested in trustees under a statute was taken by a railway company and the purchase-money paid into court. The Court directed the money to be invested and the dividends paid to any two trustees for the time being: *In re Collins' Charity* (1851), 20 L. J. Ch. 168.

(2) Dividends of a fund in court were ordered to be paid to trustees "or either of them": *In re Clinton* (1860), 6 Jur. (N.S.) 601.

(3) Order for payment of dividends to the trustees of the settlement or one of them: *In re Coulson's Settlement* (1867), 17 L. T. 27.

(4) Land belonging to a charity was taken under statutory powers and the purchase-money paid into court. The trustees of the charity presented a petition for the investment of the money and payment of the dividends to N., the secretary to the trustees. There being no treasurer, an order as prayed was made: *In re Codrington's Charity* (1874), L. R. 18 Eq. 658.

(5) Dividends were ordered to be paid to the trustees for the time being of the will or one of them: *In re Foy's Trusts* (1875), 23 W. R. 744.

Husband and wife.

Illustration.

By a marriage settlement a sum of stock was vested in trustees for a married woman for her life, and after her death to her husband for life. Upon a petition being presented for that purpose, an order was made for payment of the dividends to the wife for life, then to the husband for his life: *In re How's Trust* (1850), 15 Jur. 266.

Mother and daughter.

Illustration.

Land was taken by a railway company and the purchase-money paid into court. The land was subject (with other property) to the payment of an annuity of 500*l.* to S. for life, and subject thereto to her daughter R. for life. An order was made for the payment of the dividends of the fund to S. for life, and after her death to R. for her life, but the Court declined to make an order for the transfer of the fund after R.'s death: *In re Lowndes's Trust* (1851), 20 L. J. Ch. 422.

Successive tenants for life.

Illustration.

A fund paid into court under the Trustee Relief Acts was settled on two successive tenants for life. An order was made for payment of the dividends to the first tenant for life, and, on proof of his death to the other tenant for life, without further petition: *In re Brent's Trusts* (1860), 8 W. R. 270.

NOTE.—If the order is not so framed, a fresh application will become necessary: *In re Jolliffe's Estate* (1870), L. R. 9 Eq. 668.

Vicar.

Illustration.

Where glebe land had been taken by a railway company, the order was that the dividends should be paid to the vicar for the time being and churchwardens and overseers, or either of them: *In re Buckinghamshire Ry., Ex parte Bicester Churchwardens* (1848), 5 Rail. Cas. 702.

Archbishop.

Illustration.

A railway company took lands belonging to a see and paid the purchase-money into court. An order was made, upon petition, for payment of the dividends to the Archbishop of C. for the time being: *Ex parte Canterbury (Archbishop)* (1848), 2 De G. & Sm. 365.

Rector.

Illustrations.

(1) Land belonging to a charity was taken by a railway company and the purchase-money paid into court. An order was made for payment of the dividends to the rector of the parish for the benefit of which the charity had been established, he being a perpetual trustee of the charity: *In re Davenant's Charity* (1854), 2 W. R. 344.

(2) Property belonging to a charity having been taken under statutory powers and the purchase-money paid into court, a petition was presented for the investment thereof and payment of the dividends. It was not known in whom the legal estate was vested, the last conveyance of the freehold before the property was taken having been in 1699. An order was, in these circumstances, made for the payment of the dividends to the rector for the time being: *In re St. Benet's (Rector)* (1865), 12 L. T. 762.

- (iv.) Where it is proposed to invest temporarily on real security the Court will direct an inquiry as to the sufficiency of such security.

Illustration.

A local authority took lands and paid the purchase-money into court:—*Held*, that sect. 70 of the Lands Clauses Act distinctly provides for temporary investment of purchase-money on real security, and such an investment is perfectly proper if the security is such as the Court approves. An inquiry as to the sufficiency of the security was directed: *In re Smith's Trust Estate* (1870), L. R. 9 Eq. 178.

- (v.) In an order for investment the particular investment must be specified.

Illustration.

A petition was presented for interim investment under the Settled Estates Act, 1877, in which it was prayed that the trustees might from time to time be empowered to invest in some or one of several investments specified, with power to vary such investments:—*Held*, that the Court would only order investment in some one particular fund specified: *In re Taylor's Settled Estate* (1880), 28 W. R. 594.

- (vi.) The Court will not make alternative orders for investment, but will, if necessary, direct an inquiry.'

Illustrations.

(1) When a sum of money is in court to be invested in land, the Court will order a reference as to a proposed investment, but will refuse to make any prospective order as to any other investment in the event of the one proposed being rejected: *Ex parte Pumfrey, In re Oxford, Worcester and Wolverhampton Ry.* (1846), 4 Rail. Cas. 490.

(2) Upon an application for interim investment of purchase-money in court, the order for such investment cannot be limited by any conditions as to time or mode of any future permanent investment : *In re Newport, Abergarennwy and Hereford Ry.* (1847), 11 Jur. 160.

(3) Petition for the reinvestment in land of the purchase-moneys of land taken by a railway company, except a sum of 20*l.* An order was made for the payment of the money upon the certificate of the chief clerk that the title had been approved and the conveyance executed, and for the payment of the small balance upon the undertaking of the solicitor to lay it out in lasting improvements : *In re Hichin's Estate* (1853), 1 W. R. 505.

(4) Petition by trustees (partly interested) to have a balance of 94*l.* 15*s.* 3*d.* left in court invested in the purchase of a piece of copyhold land. Stuart, V.-C., directed an inquiry as to whether the purchase was a fit and proper one, and whether a good title could be given by the vendor : *In re Blunt's Devisees* (1854), 18 Jur. 742.

(5) The Court will, when necessary, refer it to chambers to inquire into a proper mode of investing money which has been paid into court under the Lands Clauses Act : *In re the Dunraven Estates* (1862), 5 L. T. 523.

(g) Branch of court in which orders should be made.

(i.) Subsequent proceedings in same matter.

Illustration.

When an order has to be made in a matter arising out of purchases by a railway company all subsequent orders in the same matter should be made in the same branch of the court as the earlier ones : *In re Browse* (1866), 14 L. T. 37 ; but this rule was *held* not to apply to applications for the payment of dividends upon sums paid into court in the matter of a private Act of Parliament : *In re Bilston Curacy* (1862), 10 W. R. 516.

(ii.) Proceedings in different branches of the court.

Illustrations.

(1) Lands belonging to a charity were taken by a railway company, and an order was made in one division of the court for the investment of the purchase-money and payment of the dividends. An application was afterwards made in another division of the court for leave to sell out a portion of the fund and apply the proceeds to the cost of certain farm buildings erected by the trustees. The application was allowed : *Ex parte Hayter* (1862), 10 W. R. 557.

(2) Portions of A.'s settled estates were taken under the Lands Clauses Act at different times and the purchase-moneys paid into different branches of the court. It was desired to deal with both funds at one time. The Court granted leave to present one petition in both matters in one branch of the court, without transferring either matter : *In re Arden's (Lord) Settled Estates* (1875), L. R. 10 Ch. 445.

(iii.) The costs may be disallowed when one petition would have been sufficient.

Illustration.

Two portions of settled land had been taken under the Lands Clauses Act by different bodies, and the purchase-money had been paid into court and dealt with by different branches of the court. It being desired to invest both sums in the purchase of land, two

petitions were presented. The Court, however, allowed the costs of only one: *In re Gore-Langton's Settled Estates* (1875), L. R. 10 Ch. 328.

(iv.) Transfer from one judge to another.

Illustration.

The transfer of a matter begun by petition from one judge of the Chancery Division to another can now be made only by the Lord Chancellor: *In re Boyd's Trusts* (1875), 1 Ch. D. 12.

(h) Practice: on death of petitioner.

Illustrations.

(1) Where a rector, who had petitioned for the investment of money, died, the proceedings were continued with the consent of his successor: *Ex parte Lea (Rector)* (1852), 21 L. J. Ch. 776.

(2) A petitioner under the Trustee Relief Act died pending the results of some inquiries: *Held*, that an order of revivor might be made in favour of his executor: *In re Staggoll* (1867), 15 W. R. 974.

(3) In a case before the Judicature Act a petitioner died after a petition under the Leases and Sales of Settled Estates Act had been served and advertised:—*Held*, that the petition might be amended by stating the fact and substituting a new petitioner: *In re Wilkinson's Estate* (1869), L. R. 9 Eq. 71.

(4) Y. petitioned for investment in land of a fund paid in under the Lands Clauses Act. An order was made approving of the contract. Y. died before the order was completely worked out in chambers:—*Held*, that an order should be made that Y.'s executors should be at liberty to carry on and prosecute the proceedings in the same manner: *In re Toul* (1873), L. R. 16 Eq. 107.

(5) Where a sole petitioner dies after an order made on the petition directing inquiries, and whilst those inquiries are pending, the Court will order the petition to be continued and carried on by the representatives of the petitioner: *In re Atkins' Estate* (1875), 1 Ch. D. 82.

See now Rules of the Supreme Court, Ord. XVII. rule 4.

(k) Title of lands in which money in court is invested.

Illustrations.

(1) Upon petition that a sum of 1,200*l.*, paid by a railway company for the purchase of land, might be applied in part payment of 2,800*l.* for another estate, which estate was to be mortgaged as a security for the remainder of the purchase-money, the Court refused the petition. on the ground that the trustees of the fund were not authorised to lay out the money in the purchase of an equity of redemption. The petitioner afterwards proposed to make up the necessary amount for the purchase out of his own pocket, and prayed that the estate might be conveyed without a reference. The Court refused to make the order without a reference to the master to approve the title: *Ex parte Craven, In re Cheltenham and Great Western Ry.* (1848), 17 L. J. Ch. 215.

(2) Upon applying for the reinvestment of purchase-money, the Court, in the first instance, will only approve of the purchase, the value, and the intended investment, and postpone any further order until after the opinion of one of the conveyancing counsel of the court has been obtained on the title, and an affidavit made verifying the title; but it will not make the reference to any particular counsel: *In re Martin's Estate* (1852), 21 L. J. Ch. 248; but see now R. S. C., Ord. LI. rule 13.

(3) Land belonging to a vicarage was taken by a railway company and the purchase-money paid into court to the account of the vicar. Upon a petition by the vicar stating an agreement to purchase land particularly mentioned in the agreement, that the title had been approved by a barrister, and that the title deeds had been examined and found correct, and praying for a conveyance and payment of the money out of court, without a reference to the master, the Court made the order: *Ex parte East Dereham (Vicar)* (1852), 21 L. J. Ch. 677.

(4) The Court required to be satisfied by affidavit that the purchase proposed to be made was a fit and proper investment of the fund; and, having been satisfied by the evidence on this point, directed a note to be taken by the registrar that the Court approved of the purchase, and that the petition was to stand over until the opinion of one of the conveyancing counsel should be produced. It was not necessary to draw up any order of reference. The approval of the title was required to be verified by affidavit, and the draft conveyance to be settled by the conveyancing counsel: *In re Caddick's Estate* (1852), 9 Hare, Appx. lxxxv.

(5) Where the conveyancing counsel certified that the title to a proposed purchase of land, "though not a good title of sixty years, was a substantially safe holding one," and the purchase appearing in other respects desirable and for the benefit of the infant, the Court sanctioned the purchase: *In re Sheffield and Rotherham Ry.* (1853), 1 Sm. & G. (App.) iv.

(6) The Court will not sanction a purchase of land upon the opinion of a surveyor as to its value. The facts must be fully stated, and the Court will form its own conclusions upon them: *In re Kinsey* (1863), 1 N. R. 303.

(7) Upon a petition for the reinvestment of 50*l.* paid into court under the Lands Clauses Act in land adjacent to the settled estate, the Court declined to dispense with the usual order of reference as to title, but gave leave to the parties to apply in chambers to dispense with the investigation of the title wholly or in part: *In re Blomfield* (1876) 25 W. R. 37.

(l) (i.) An affidavit of title to the lands taken is necessary before the money in court can be paid out or the funds invested and the income ordered to be paid to the petitioner (see R. S. C., Ord. LII. rule 18).

Illustrations.

(1) In all petitions under Acts of Parliament for payment of money out of court an affidavit must be forthcoming verifying the title shortly, and also stating that, to the best of the knowledge and belief of the deponents, no other person had any title to or claimed any interest in the estates: *Ex parte Shears, In re Fleet Market Improvement Act* (1828), 2 Y. & J. 493.

(2) Application was made to the Court on behalf of E. for payment of purchase-money out of court, and the Court directed the money to be paid out, although the only evidence of the title to the lands was E.'s own affidavit: *In re Birmingham and Gloucester Ry., Ex parte Ellenborough* (1838), 3 Y. & C. 66, n.

(3) By a special Act it was provided that in case any question should arise as to the title of the lands to be taken or used for the purposes of the Act, the person in possession at the time of the purchase should be deemed to be lawfully entitled, until the contrary was shown to the satisfaction of the Court; and, further, that if the owner or other person interested in the land and entitled to receive the purchase-money should be unable to make a good title to the land, it should be lawful for the company to pay the money into court to the credit of the person interested, subject to the disposition of the Court, and thereupon the company's title should be deemed complete. The company having acquired certain land, objected to the title, and paid the purchase-money into court to the credit of the person with whom they contracted:—*Held*, that such person, upon his own affidavit of title, was entitled to have the money paid out to him: *Ex parte Grainge, In re Great Western Ry.* (1838), 3 Y. & C. 62.

(4) A tenant for life must, upon applying to the Court for payment of the interest and dividend of money paid in and invested as the value of land taken under statutory powers, satisfy the Court (by affidavit) that there is no other person entitled: *In re Milne's Estate* (1863), 8 L. T. 199.

(5) Upon an application that money in court may be invested and the invested funds carried to the credit of a cause, there must be the usual affidavit of title, even although the income only of the fund is proposed to be dealt with: *Ex parte St. Mary's College Winchester* (1866), 14 W. R. 788.

(6) The Court will order a fund in court to be paid to several petitioners on an affidavit by one of them sufficiently verifying the title of all of the petitioners to such fund: *Jersey v. Jersey, In re Vale of Neath Ry.* (1866), 14 L. T. 13.

- (ii.) Beyond the affidavit of title the Court will not inquire into the title of the tenant in possession who claims the income of the fund in court.

Illustrations.

(1) A railway company purchased freehold land from the tenant for life and paid the compensation money into court. Upon investigation of the title, part of the land was found to be copyhold with a defective title as to one undivided moiety, and an apportionment of the money was therefore directed, so as to carry over the amount representing the price of that part of the land to which a good title had been made, and the dividends to be paid to the tenant for life, but the capital not to be paid out without notice to the company: *In re Perkes* (1853), 1 Sm. & G. 545.

(2) When the person in possession of lands taken by a railway company produced his abstract of title, it appeared that a will, under which he claimed, was susceptible of and had received from four eminent conveyancers four different interpretations:—*Held*, that it was not the duty of the Court on a petition by a person claiming as tenant in possession to examine into the title of the person so claiming; and payment of the income was therefore ordered to the petitioner: *In re Perry's Estate* (1855), 1 Jur. (N.S.) 917.

- (iii.) If the claimant has no title the Court has no jurisdiction to order the whole fund to be repaid to the promoters.

Illustration.

Where the amount of valuation of a leasehold interest in premises taken by a railway company was paid into court, and it afterwards turned out that the presumed lessee was

not entitled to the interest in the premises, the assessed value of which had been paid into court, but to another interest:—*Held*, that the Court had no jurisdiction to order the whole of the money so paid in to be returned to the company paying it in, leaving them to proceed afresh to ascertain the true interest, but that the Court would, by means of its ordinary machinery, ascertain by reference to chambers the value of the actual interest; and, after payment of the ascertained value to the party entitled, order any balance to be repaid to the company: *Ex parte Cooper, In re North London Ry.* (1865), 2 Dr. & S. 312.

- (iv.) The Court may, notwithstanding that there may be a dispute as to the parties to the conveyance, direct the dividends to be paid to the petitioner.

Illustrations.

(1) A railway company took, under statutory powers, land which was subject to the payment of an annuity to B. for life, and paid the purchase-money into court. The company insisted that the concurrence of B. in the conveyance was necessary. Upon presentation of a petition by the owner for the payment to him of the dividends of the fund:—*Held*, that he was entitled to the dividends, notwithstanding the dispute as to the conveyance: *Ex parte Cofield* (1847), 11 Jur. 1071.

(2) Part of a settled estate having been taken under statutory powers and the purchase-money paid into court, a petition was presented by the tenant for life for the investment of the money in land, and for investment of the money in stock in the meantime, and payment of the dividends to the petitioner. It appeared that there were several incumbrancers of the petitioner's interest, and these, at the suggestion of the purchasing company, were served, and appeared, but did not oppose. The purchasers, a railway company, had taken possession. An order was made for payment of arrears and of future dividends to the tenant for life: *In re Hungerford* (1855), 1 K. & J. 413.

(3) Land belonging to a settled estate was taken by a railway company, and by agreement part of the purchase-money was paid into court, the dividends to be paid to the tenant for life, although the conveyance had not been executed. Possession was taken by the company, who were to pay 4 per cent. interest on the balance of the purchase-money. The tenant for life presented a petition for investment of the fund and payment of the dividends to him. The company objected, but an order was made on the petition as asked: *In re Wrey's Settlement* (1865), 13 W. R. 543.

(m) Affidavits in support of a petition (*see* Ord. LII. rule 18, of the Rules of the Supreme Court).

- (i.) The affidavit in support of a petition for payment out should be made by the petitioner personally.

Illustration.

In a petition for payment out of purchase-money for lands taken under the Lands Clauses Act, the affidavit in support of the petition was made by the petitioner's solicitor:—*Held*, that this was not sufficient, and that the affidavit must be made by the petitioner personally asserting her title and stating her belief that no other person had a title: *In re London and North-Western Ry. and Bray (Lady)* (1852), 1 W. R. 60.

- (ii.) But where the petitioner is unable, from old age or other

good cause, to make an affidavit, that of some other person, *e.g.*, the solicitor or executor, may be accepted.

Illustrations.

(1) The application was allowed where the affidavit had been made by the personal representatives, the tenant for life being very old and infirm, and the remaindermen infants: *In re Smith's Leaseholds* (1866), 14 W. R. 949. But in the case of *Ex parte Hollick, In re Eastern Counties Ry.* (1846), 4 Rail. Cas. 498, this course was not allowed by Knight Bruce, V.-C.

(2) A petition was presented by a tenant for life for the investment of money paid into court for land taken under statutory powers, and for payment to him of the dividends. He was too infirm to make the required affidavit of title, and one had accordingly been made by his solicitor:—*Held*, that this was enough: *In re Halsey's Estate* (1870), 22 L. T. 11.

(iii.) The Court may accept as sufficient the affidavit of one of several joint mortgagees.

Illustration.

The Court made an order for the fund in court to be paid to several petitioners (joint mortgagees) on an affidavit made by one of them sufficiently verifying the title of all the petitioners to such fund: *In re Vale of Neath Ry. Act, Jersey v. Jersey* (1866), 14 L. T. 13.

(iv.) When the application is made on behalf of a number of persons entitled, *e.g.*, under a will, the affidavit of the surviving trustee of the will as to the title, negating the existence of other claims, will be accepted.

Illustration.

Purchase-money having been paid into court, a petition was presented by the ten persons entitled under a will to share in the fund for payment of it to them, and an affidavit verifying their title had been made by the surviving trustee of the will, but no affidavit had been made, as required, not only verifying their title, but also stating that they were not aware of any right in any other person or of any claim made by any other person to the fund:—*Held*, that the affidavit of the trustee was sufficient, and an order for payment out was made: *In re Batty's Trusts* [1877] W. N. 212.

(v.) The Court may accept the affidavit of the clerk to trustees.

Illustration.

A petition was presented by the trustees of a charity for investment of a sum paid into court for lands taken. The affidavit verifying the title and negating the existence of any other claim was made by the clerk to the trustees only:—*Held*, that this was sufficient: *In re King Edward the Sixth's Almshouses* (1868), 16 W. R. 841.

(vi.) When the petitioner is claiming the money in court upon attaining majority there should, as a rule, be an affidavit of

a disinterested person as to his age; but the Court may accept the applicant's affidavit verifying his certificate of baptism.

Illustration.

A petition was presented for payment out to persons who had become entitled thereto by reason of their coming of age. The certificate of baptism of one applicant was verified only by his own affidavit:—*Held*, by Pearson, J., that this was sufficient: *In re Bulley's Settlement* [1886] W. N. 80.

- (vii.) Where the application is made on behalf of an important public body, the Court may dispense with the affidavit as to title.

Illustration.

(1) A petition was presented by the warden, scholars and clerks of a college for the investment of a fund in court and payment of the dividends. There was no affidavit as to title and other claims on the fund:—*Held*, that this must be supplied: *Ex parte St. Mary's College, Winchester (Warden)* (1866), 14 W. R. 788.

But *see* next case.

(2) A petition was presented by the president and scholars of a college for the interim investment of money paid into court for land taken. No affidavit of title had been supplied. Jessel, M.R., made the order asked for, and dispensed with the affidavit, observing that the rule was not intended to apply to large bodies like the petitioners in the case: *In re Magdalen College, Oxford (President)* (1880), 42 L. T. 822.

- (viii.) Applications by persons claiming to be absolutely entitled for payment out of money in court or for reinvestment should be supported by an affidavit of no incumbrances, and *prima facie* the affidavit should be that of the applicant.

Illustrations.

(1) A petition was presented for payment out of court of a fund to a person entitled thereto who, being a tenant in tail, had executed a disentailing assurance:—*Held*, that the fund could not be paid out until an affidavit of no incumbrances had been filed: *Thornhill v. Milbank* (1864), 12 W. R. 523.

(2) A petition asked for the reinvestment of purchase-money of lands belonging to a charity. Fry, J., declined to dispense with the affidavit of no incumbrances: *In re Byron's Charity* [1883] W. N. 67.

(3) In an action for the execution of the trusts of a marriage settlement, in which judgment had been given and a receiver appointed, a petition was presented by the tenant in tail in possession under the settlement for payment out of a fund in court (representing real estate sold) upon his coming of age. He had executed a disentailing assurance:—*Held* that, the money representing real estate, there must be an affidavit of no incumbrances, and that *prima facie* the proper person to make the affidavit was the petitioner: *Williams v. Ware* (1888), 57 L. J. Ch. 497.

- (ix.) When the petition for payment out of court is made by a

married woman or a widow who has become entitled to the fund, there must be an affidavit of no settlement.

Illustrations.

(1) Upon an application for payment out of court of money belonging to a married woman, the affidavit went simply to show that the fund in question was not settled :—*Held*, that this was not enough ; the affidavit must show either that there was no settlement or what the settlement was : *Britten v. Britten* (1846), 9 Beav. 143.

(2) Upon a petition by a widow for payment out of court of money to the payment of which she had become entitled since the death of her husband, the Court required an affidavit that no settlement was made on her marriage with her late husband : *Elrington v. Elrington* (1859), 4 Drew. 545.

(x.) The Court may accept the affidavit of the wife alone as to no settlement.

Illustrations.

(1) Where A. sold a fund to which his wife was entitled in reversion, and when it fell into possession he was living in Africa, and the wife consented to waive her equity to a settlement and that the fund should be transferred to the purchaser :—*Held*, that the usual affidavit of no settlement which could affect the fund might be made by the wife alone : *Elliott v. Remington* (1839), 9 Sim. 502.

(2) Where a married woman, whose husband was in New Zealand, became entitled to a fund, the Court accepted the evidence of the wife alone that there had been no settlement : *Wilkinson v. Schneider, In re Le Blanc* (1870), 39 L. J. Ch. 410.

(3) An administration suit was instituted by a residuary legatee, who was a married woman, suing as a *feme sole* by virtue of the Divorce Act, 1857. The plaintiff had been deserted by her husband, and had obtained a protection order under the said Act :—*Held*, that evidence must be produced that the separation was a continuing one, but the evidence by affidavit of the plaintiff was accepted as to this, and also as to no settlement, or agreement for a settlement, having been made, and her share was ordered to be paid out to her : *Ewart v. Chubb* (1875), L. R. 20 Eq. 454.

(xi.) When both husband and wife are abroad, the Court may accept the affidavit of their solicitor as to no settlement ; and when the sums to be paid out are very small, the Court may dispense with the affidavit.

Illustrations.

(1) In a cause where a fund in court became divisible into twenty-two shares of less than 10*l.* each, the Court dispensed with the affidavit of no settlement : *Veal v. Veal* (1867), L. R. 4 Eq. 115.

(2) Where one of the parties entitled to a fund was a married woman residing with her husband in the United States, the affidavit of her solicitor as to there having been no settlement on her marriage, according to his knowledge and information, was accepted : *Woodward v. Pratt* (1873), L. R. 16 Eq. 127.

(3) In an administration suit, where the shares becoming payable were under 20*l.* in amount, Pearson, J., dispensed with the affidavit of no settlement, observing that "the case could not well be made a precedent" : *Guest v. Neames* [1884] W. N. 227.

- (xii.) Execution of a deed may be proved by an affidavit verifying the handwriting of the attesting witness.

Illustration.

A railway company had paid in purchase-money of settled land taken by them. On an unopposed petition for payment out, the petitioners proposed to prove execution of a deed, which was material for their title, by verifying the handwriting of the attesting witnesses :—*Held*, that this was sufficient : *In re Mair's Estate* (1873), 28 L. T. 760.

III. The income accruing upon funds is now apportionable under the Apportionment Act, 1870 (33 & 34 Vict. c. 35).

By sect. 2 of that Act, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall from and after August 1st, 1870, like interest or money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. As to payment of dividends after death of the person entitled, see rule 62 of the Supreme Court Funds Rules.

IV. Liability of solicitor for loss arising from his not investing the fund according to an order of the Court.

Illustration.

B., the plaintiff in an action, obtained an order for sale of property, and had the conduct of the sale. The purchase-money was paid in under order of the Court, and was ordered to be invested and the dividends accumulated. B.'s solicitor omitted to leave with the paymaster a request for investment, and the money was not invested : *Held*, that B.'s solicitor was acting as an officer of the Court in the conduct of the sale, and was liable not only to his own client, but also to the Court, for the due discharge of his duty, and that he was liable to make good the loss of interest, but was entitled to set off a gain resulting from a fall in the price of Consols in the interval : *Batten v. Wedgwood Coal and Iron Co.* (1886), 31 Ch. D. 346.

Sums from 20*l.*
to 200*l.* to be
deposited or paid
to Trustees.

71. If such Purchase Money or Compensation shall not amount to the sum of Two hundred Pounds, and shall exceed the Sum of Twenty Pounds, the same shall either be paid into the Bank, and applied in the Manner herein-before directed with respect to Sums amounting to or exceeding Two hundred Pounds, or the same may lawfully be paid to Two Trustees, to be nominated by the Parties entitled to the Rents or Profits of the Lands in respect whereof the same shall be payable, such Nomination

to be signified by Writing under the Hands of the Party so entitled ; and in case of the Coverture, Infancy, Lunacy, or other Incapacity of the Parties entitled to such Monies, such Nomination may lawfully be made by their respective Husbands, Guardians, Committees, or Trustees ; but such last-mentioned Application of the Monies shall not be made unless the Promoters of the Undertaking approve thereof and of the Trustees named for the Purpose ; and the Money so paid to such Trustees, and the Produce arising therefrom, shall be by such Trustees applied in the Manner herein-before directed with respect to Money paid into the Bank, but it shall not be necessary to obtain any Order of the Court for that Purpose.

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Preliminary.—This section deals with the application of purchase-money or compensation when the amount is between £20 and £200. It may be dealt with (a) in the same way as if it exceeded £200 ; or (b) it may, with the approval of the promoters, be paid to two trustees appointed in the manner directed by the section.

I. Disposal of small amounts of purchase-money.

Illustration.

Where a sum of 34*l.* had been paid into court under the Lands Clauses Act, 1845, payment out was directed to a tenant for life, he undertaking to lay out the same in lasting improvements, there being no hard-and-fast rule as to the limit of the amount that may be paid out in this way : *In re Guardians of Kells Union, Ex parte Smith* (1888), 21 L. R. Ir. 346.

II. Disposal of purchase-money after reduction by investment.

(a) Where the amount in court is reduced by investment to a sum exceeding 20*l.*, but less than 200*l.*, it may be dealt with as if it were purchase-money between such amounts.

(b) Any balance not exceeding 20*l.* remaining after the reinvestment

of money in court may be ordered to be paid out to the tenant for life or other person entitled (*see* sect. 72).

Illustrations.

(1) Where a sum paid into the bank under the Lands Clauses Act was about to be reduced by an investment in land to a sum of less than 70*l.*, the residue was ordered to be paid out to two trustees nominated by the petitioner pursuant to sect. 71 : *In re Kinsey* (1863), 1 N. R. 303.

(2) M. by his will left a leasehold to A. for life, with remainder to her issue. A railway company took the land, and the purchase-money was paid into court. The master approved of an agreement to invest the fund except 30*l.* in the purchase of another leasehold. On a petition praying for confirmation of the report, the Court directed the 30*l.* to be paid to A. on her undertaking to expend it in lasting improvements : *Ex parte Barrett* (1850), 19 L. J. Ch. 415.

72. If such Money shall not exceed the Sum of Twenty Pounds, the same shall be paid to the Parties entitled to the Rents and Profits of the Lands in respect whereof the same shall be payable, for their own Use and Benefit, or in case of the Coverture, Infancy, Idiocy, Lunacy, or other Incapacity, of any such Parties, then such Money shall be paid, for their Use, to the respective Husbands, Guardians, Committees, or Trustees of such Persons.

Sums not exceeding 20*l.* to be paid to Parties.

This section also applies when by investment the purchase-money paid into Court is reduced to a sum not exceeding £20.

Illustrations.

(1) Where it was probable that a sum of money left in court—part of the amount paid into court by a railway company—would be less than 20*l.*, it was ordered that such sum should be paid out to the tenant for life : *In re Egremont (Lord)* (1848), 12 Jur. 618.

(2) Land belonging to the rectory of B. was taken by a railway, and the purchase-money, amounting to 200*l.*, paid into court. Other land was found for reinvestment of the money, which, with the expenses, cost 179*l.* 10*s.* The rector petitioned for payment to him of the balance of 20*l.* 10*s.* to meet his extra costs beyond those allowed by the Act, but the Court refused to make such an order : *Ex parte Bredicot (Rector)* (1848), 17 L. J. Ch. 414.

(3) The costs of a second investment in land and of the conveyance and petition were allowed and a residue of 14*l.*, money in court, directed to be paid to the petitioner for his own use : *Ex parte Loughton (Rector)* (1849), 5 Rail. Cas. 591.

(4) A railway company took some settled lands and paid the purchase-money into court. The purchase-money, with the exception of 52*l.*, was laid out in the purchase of other lands. On an application by the tenant for life asking that this sum of 52*l.* might be paid to him, he undertaking to lay it out in lasting improvements, Parker, V.-C., said that the

rule which he laid down was not to allow sums exceeding 20*l.* to be paid out under such circumstances : *In re Bateman's Estate* (1852), 21 L. J. Ch. 691.

(5) Upon a petition for the reinvestment in land of the purchase-money of lands taken, except a sum of 20*l.*, a prospective order was made, by Wood, V.-C., for the payment of the money upon the certificate of the chief clerk that the title had been approved and the conveyance executed, and payment of the small balance was directed to be made to the petitioner's solicitor upon his undertaking to lay it out in lasting improvements : *In re Hichin's Estate* (1852), 1 W. R. 505.

(6) On a petition for the reinvestment in land of money paid into court by a company for land belonging to a benefice which had been taken under their compulsory powers, the Court, following *In re Bateman's Estate* (*supra*), directed that the balance, if any, not exceeding 20*l.* after paying such purchase-money, might be paid to the incumbent : *Ex parte Sheffield (Vicar)* (1904), 68 J. P. 313.

All Sums payable under Contract with Persons not absolutely entitled, to be paid into Bank.

73. All Sums of Money exceeding Twenty Pounds, which may be payable by the Promoters of the Undertaking in respect of the taking, using, or interfering with any Lands under a

Contract or Agreement with any Person who shall not be entitled to dispose of such Lands, or of the Interest therein contracted to be sold by him absolutely for his own Benefit, shall be paid into the Bank or to Trustees in manner aforesaid ; and it shall not be lawful for any contracting Party not entitled as aforesaid to retain to his own Use any Portion of the Sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such Lands, or in lieu of Bridges, Tunnels, or other Accommodation Works, or for assenting to or not opposing the passing of the Bill authorizing the taking of such Lands ; but all such Monies shall be deemed to have been contracted to be paid for and on account of the several Parties interested in such Lands, as well in possession as in remainder, reversion, or expectancy : Provided always, that it shall be in the Discretion of the Court of Chancery in England or the Court of Exchequer in Ireland, or the said Trustees, as the Case may be, to allot to any Tenant for Life, or for any other partial or qualified Estate, for his own Use, a Portion of the Sum so paid into the Bank, or to such Trustees as aforesaid, as Compensation for any Injury, Inconvenience, or Annoyance which he may be considered to sustain, independently of the actual Value of the Lands to be

taken and of the Damage occasioned to the Lands held therewith, by reason of the taking of such Lands and the making of the Works.

[The words in italics were repealed by the Statute Law Revision Act, 1892.]

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I. Effect of the section.

Illustration.

"Now, a second question has been raised . . . viz., that, under the 73rd clause of the Lands Clauses Act a tenant for life is expressly forbidden from taking for his own use money which may be contracted to be paid, either in consideration of his not opposing a Bill, or for any special damage to be done to himself with reference to the severance of the estate; in other words, for matters which do not clearly and distinctly concern him, and him alone. The object of that provision is, that he being placed, as the Act expressly places him, in the position of a person capable of entering into a contract with the company, he shall not, as between himself and the remainderman, be put into a situation of temptation whereby he may be likely to sacrifice those who are in remainder. In regard to such a contract, they are, no doubt, in the position of *cestuis que trust* to him, and he in that of a trustee for them. The intention of the Act is that he shall not be put into the position of being tempted to misappropriate a portion of the funds, or to make a colourable bargain, merely for the purpose of putting a sum of money into his own pocket. But the very expressions in the Act show that the Court of Chancery is to determine what portion is proper and right to be assigned to him, because part of the money paid may be in respect of his own personal grievances. And as regards his legal position, he is at law competent to enter into a contract for the whole estate, and for the whole damage by severance, and for the withdrawing of opposition as the condition of the contract that may be entered into. But if he does it, the whole bargain shall be for the benefit of the estate, and as between him and the remainderman is to be settled and adjusted, if they cannot agree, by the power of the Court of Chancery": *per* Lord Hatherley, C., in *Taylor v. Chichester and Midhurst Ry.* (1870), L. R. 4 H. L. at p. 643.

II. Compensation to tenants for life and other limited owners.

The following cases illustrate the exercise of the discretion of the Court to allot to any tenant for life or for any other partial or qualified estate, for his own use, a portion of the sum paid into the bank as compensation for injury, inconvenience, or annoyance which he may be considered to sustain.

Cost of fencing glebe land.

Illustration.

Part of the glebe belonging to a rectory having been taken by a railway company, a sum of 30*l.* was ordered to be paid out to the rector as compensation for the injury, inconvenience or annoyance sustained by him, it being shown that it would cost 30*l.* to make the necessary alterations in the fences and distribution of the glebe lands : *Ex parte Little Steeping (Rector)*, *In re East Lincolnshire Ry.* (1848), 5 Rail. Cas. 207.

Cost of diversion of road.

Illustration.

A railway company agreed to pay C. (tenant for life) a sum for the benefit of the owner for the time being by way of indemnity for the expense of making a new road, &c., and as compensation for the annoyance such owner might sustain through the construction of the railway. The money having been paid into court :—*Held*, that C. was entitled only to the expense of making the new road, &c., and to the interest for life of the balance when invested : *In re Marlborough's (Duke) Estates* (1849), 13 Jur. 738.

Expenses of inclosure.

Illustration.

Under an inclosure Act some lands were allotted to a rector, who had a power of sale to pay the expenses. Under a railway Act compensation was made in respect of other lands of the rectory and paid into court. The Court sanctioned the application of the money in court to the payment of the expenses of inclosure : *Ex parte Lockwood*, *In re Oxford, Worcester and Wolverhampton Ry.* (1851), 14 Beav. 158.

High rate of interest.

Illustration.

H., the tenant for life, contracted to sell certain lands to a railway company, the company until conveyance to pay 5 per cent. interest on the purchase-money to H. for his own use :—*Held*, that this high rate of interest was not (in the absence of any fraud) an unfair advantage for H. to take of his position : *In re Hungerford*, *In re Rugby and Stamford Ry.* (1855), 1 Jur. (N.S.) 845.

Agreement by tenant for life not to oppose Bill.

Illustration.

P., who was tenant for life, received from a railway company 3,000*l.*, in consideration of his not opposing a Bill for a railway to pass through his estate, and, the Bill becoming law, parts of the estate were taken, and the purchase-money paid into court, but P. retained the 3,000*l.* :—*Held*, that the 3,000*l.* fell under sect. 73, and P. was declared trustee thereof for himself and the persons entitled in remainder to the estate, and he was ordered to pay the same into court : *Pole v. De la Pole* (1865), 2 Dr. & Sm. 420.

Enfranchisement of copyholds. Royalty on bricks.

Illustrations.

(1) A railway company took certain copyhold lands, parcel of a manor of which W. was tenant for life. A sum of 4,698*l.* was agreed as the compensation due, including

1,016*l.* as the amount of fines which W. would have received in the event of compulsory enfranchisement, and 200*l.* as the royalty on bricks. W. claimed these two sums as part of the profits of the life estate :—*Held*, that W. was not entitled to either sum, but only to the interest thereof : *In re Wilson* (1863), 9 Jur. (N.S.) 1043. “The tenant for life had no right, as against the company, to insist on the payment of the fines in question, and if, as appears likely, this sum entered into the calculations of the arbitrator, the result merely is that Sir T. M. Wilson made a very good bargain, the benefit of which must enure for the good of the inheritance. The fines were not specifically included in the award, which was for a lump sum ; but supposing that Sir T. M. Wilson had succeeded in persuading the company expressly to pay to him a sum on this account, which was not legally due, I apprehend that, as between him and the remaindermen, he could not appropriate to himself any portion of what he had received beyond the amount legally payable by the company to the tenant for life” : *per* Wood, V.-C., *ib.* “If the question were whether the interest of the tenant for life should be severed from the fund, and the residue free from that interest should be given over to the remainderman, I should have allowed more weight to the argument ; but here the claim is to assume a certain benefit of a particular character to have fallen in to the tenant for life, which did not fall in at that time ; and that the tenant for life is not only to take out of the fund the particular benefit assumed to have fallen to him, but also to have the income of the residue as well. There is no justice or reason in this claim. The possible benefits which may be derived from the tenancy for life are to be considered in estimating the whole value so far as they affect the particular land taken. The fee simple of the manor is to be valued, and in estimating the value to the lord of the manor for the time being, the possibility of fines is to be taken into consideration ; but upon what principle the interest of the tenant for life is to be severed from the reversion I do not understand. It appears to me that the Vice-Chancellor has taken a correct view of the case. He gives to the tenant for life damages in respect of the immediate injury to the life estate, making the residue to represent the inheritance, and giving to the tenant for life the interest of the fund. I do not see how the Vice-Chancellor could have taken any other course” : *per* Knight Bruce, L.J., *S. C.* 32 L. J. Ch. at 193.

Personal inconvenience caused to tenant for life.

Illustrations.

(1) A tenant for life sold certain land, by agreement, to a railway company, and the purchase-money (310*l.*) was paid into court. A part of this sum was assessed as compensation for the injury and inconvenience sustained by the tenant for life beyond the value of the land and the damage to the other land occasioned by the works of the company. Upon petition the Court directed this latter sum to be paid to the tenant for life, ordered the balance to be invested in Consols and the dividends paid to the tenant for life and the costs of the petition by the company : *In re Collis* (1866), 14 L. T. 352.

NOTE.—The case does not mention the kind of personal inconvenience.

(2) A railway company purchased part of the glebe, and began the construction of a railway close to the rectory-house. The execution of these works caused great inconvenience to the rector, but no pecuniary damage. An application by the rector that 100*l.* might be allowed him out of the purchase-money as compensation for personal inconvenience and annoyance was granted : *Ex parte Saunderton (Rector)*, [1903] 1 Ch. 480.

Sporting rights.

Illustration.

T. was the owner of land in Sussex, and the defendants, to induce T. to withdraw his opposition, agreed with him (in the event of their Bill passing into law during that session

of Parliament) to purchase certain parts of his estate for 2,000*l.* and to pay a further sum of 2,000*l.* as personal compensation for the annoyance, disturbance, and injury to the sporting and preservation of game upon the estate. The Bill passed, but the money was not paid, and T. sued to recover it. The defendants pleaded—(1) that the railway had not yet been constructed and that no part of T.'s land had been taken; (2) that T. had not suffered any annoyance, &c., as to the sporting through the construction of the railway, and that neither T.'s land nor his interest therein had been affected by any works, &c. T. was *held* to be entitled to recover 2,000*l.*, the amount agreed to be paid as personal compensation: *Taylor v. Chichester and Midhurst Ry.* (1870), L. R. 4 H. L. 628.

Personal loss and inconvenience in business.

Illustrations.

(1) C. was the occupier of a house, under a lease of which eight and a half years were unexpired, in which he carried on his business as a tailor. In September, 1880, the M. Board of Works gave him notice to treat for the purchase of his interest. C. sent in a claim for 655*l.*, for the value of his lease, damage to trade, cost of removal, and for fixtures. In January, 1881, the Board offered him 330*l.*, and afterwards agreed to pay 400*l.*, viz., 150*l.* for C.'s leasehold interest, and 250*l.* for trade damage and other items of claim:—*Held*, that the sum of 250*l.* was in the nature of personal compensation, and that C., who could not make a title, was entitled to it: *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472.

(2) B. was tenant for life of a leasehold hotel, with remainder to E. A railway company purchased the property for the purposes of their undertaking. The compensation was assessed by arbitration and an award made for 451*l.* for the leasehold and 800*l.* for severance, &c., including loss of trade profits. B. and one claiming under E. traversed the award, and by agreement between B. and the company the 451*l.* was increased to 901*l.* and the 800*l.* to 1,599*l.*, and it was further agreed that the 1,599*l.* should be paid to B. in respect of her trade disturbances in the premises:—*Held*, that under the circumstances the 800*l.* must be taken to be part of the compensation for taking the premises, but that 799*l.* increase thereof under the agreement was personal compensation to which B. was entitled: *In re South City Market Co., Ex parte Bergin* (1884), 13 L. R. Ir. 245.

III. Costs of tenants for life and other limited owners not payable by promoters.

(a) The Court now has power under sect. 36 of the Settled Land Act, 1882, to allow the costs incurred in any action, defence, petition to Parliament, Parliamentary opposition, or other proceeding brought or taken for the protection of settled land.

Illustrations.

(1) E. O., the first tenant for life of a settled estate, before the date when the Settled Land Act, 1882, came into force, paid out of her own moneys the costs of the successful opposition made by the trustees to some Bills in Parliament, which contained provisions deemed injurious to the estate. Upon application for a direction to the trustees to apply capital money in their hands to the payment of these costs:—*Held*, that independently of sect. 36 of the Settled Land Act, 1882, the Court, under its general jurisdiction, had power to direct the payment of the costs of the Parliamentary opposition out of the capital money and directed them to be paid: *In re Ormrod's Settled Estates*, [1892] 2 Ch. 318.

NOTE.—In the case of *In re Earl of Berkeley* (1874), L. R. 10 Ch. 56, a tenant for life was not allowed the cost incurred by him in opposing a Bill in Parliament, but that case was previous to the Settled Land Acts,

(2) A part of a churchyard was taken by the London County Council :—*Held*, that the Court had jurisdiction to order part of the purchase-money to be applied towards payment of the rector's Parliamentary costs : *In re London County Council, Ex parte Pennington* (1901), 84 L. T. 808.

(b) Costs properly incurred by a person having only a qualified estate which are not payable by the promoters and which may be ordered to be paid out of the fund in court are :—

Costs of preliminary negotiations ;

Costs of endeavouring to arrange sale of the lands by private contract ;

Costs of arbitration in which a sum less than that offered by the promoters has been awarded ;

Costs which are not paid by the promoters owing to insolvency ;

Costs of opposition to Parliamentary Bills (see *supra*).

Tenant for life.

Illustrations.

(1) The tenant for life of certain settled estates, upon advice, refused an offer by a railway company of 2,200*l.* for land proposed to be taken. The matter being thereupon referred to arbitration, the sum of 2,107*l.* was awarded by the umpire. Upon a petition by the tenant for life it was ordered that his costs, as between solicitor and client, incident to the arbitration, should be paid out of the purchase-money : *In re Aubrey's Estate* (1853), 17 Jur. 874.

(2) Petition by a tenant for life of certain lands, a portion of which had been taken by a railway company, asking that a sum of 490*l.*, the purchase-money awarded by an arbitrator and paid into court by the company, might be invested and the dividends paid to her for her life, and for her costs in endeavouring to arrange with the company for the sale to them of the lands by private contract before arbitration, or otherwise in and about the survey and valuation of the said lands and the purchase thereof, and which were not payable by the company :—*Held*, following *In re Aubrey's Estate (ante)*, that the tenant for life was entitled to these costs as asked, and the company was ordered to pay the costs of the petition : *In re Oldham's Estate* [1871] W. N. 190.

(3) A railway company served notice to treat in respect of certain portions of a settled estate and paid the purchase-money of part into court, after having abandoned a part of their undertaking, the money in court representing the portions actually acquired. The petitioner (the tenant for life) had, before the abandonment, incurred certain costs, charges and expenses in respect of the portions of the estate not taken, and also in attempting to enforce payment of compensation for the failure by the company to act upon the notices to treat given by them ; and the petition asked that the residue of the costs, charges and expenses not properly payable by the company might be paid out of the fund in court :—*Held*, that these costs, charges and expenses were payable out of the fund before it was invested : *In re Strathmore Estates* (1874), L. R. 18 Eq. 338.

Rector or vicar.

Illustration.

Certain glebe lands were taken by a railway company and the purchase-money paid into court. An order was made on the petition of the rector for its reinvestment and for

payment of the dividends to him for his life, and for payment by the company of his costs. The railway company had become insolvent, leaving part of the costs unpaid :—*Held*, that part of the fund in court might be applied to the payment to the rector's solicitors of the balance still owing to them : *In re Great Yeldham Glebe Lands, In re Colne Valley and Hulstead Ry.* (1869), L. R. 9 Eq. 68.

Perpetual curate.

Illustration.

G., the perpetual curate of W., refused a sum of money offered by a corporation as the value of glebe lands taken for public purposes, and required the matter to be settled by arbitration. A smaller sum than that offered was awarded. Upon petition G.'s costs incidental to the arbitration were ordered to be paid out of the purchase-money : *Ex parte Whitworth (Perpetual Curate)* (1871), 24 L. T. 126.

IV. Municipal corporations have the right to defray out of the borough fund or rates the cost of protecting their property by opposing a Bill in Parliament.

Illustration.

The B. Corporation opposed a Bill promoted by the M. Company which interfered with the rights of the corporation as governing body of the borough. The corporation proposed to charge the expenses of the opposition upon the funds and rates of the borough :—*Held*, that the effect of the Municipal Corporations Act, 1835, reduced corporations to the position of trustees, that consequently they had the ordinary right of trustees to defend the trust at the expense of the fund, that the expenses of opposing an attack, either by action or by Bill in Parliament, upon their existence as a corporation, or upon their property, or upon their right, privileges, and duties, are either necessary expenses for the purpose of the Municipal Corporations Act or accrue to the corporation by virtue of their trusteeship ; and that the Municipal Corporations (Borough Funds) Act, 1872, though it increased the responsibility of corporations, did not diminish their powers : *Att.-Gen. v. Brecon Corporation* (1872), 10 Ch. D. 204.

V. Mortgagee's costs of inquiries.

Illustration.

R. was a mortgagee of freehold property which had been taken by the M. Board of Works under statutory powers. R. brought a foreclosure action against the Board, his mortgagor, and others. After issue of the writ and before statement of claim the Board paid the compensation money into court, and paid to R. his taxed costs of the inquiry. R. claimed to have the difference between the actual and the taxed costs of the inquiry paid to him out of the compensation in priority to the defendants other than the Board :—*Held*, that R. was only entitled to the ordinary form of inquiry "whether anything and what is due to him for any and what costs, charges and expenses properly incurred by him in respect of his mortgage security," and not to an express direction that he was to be allowed these extra costs : *Rees v. Metropolitan Board of Works* (1880), 14 Ch. D. 372.

VI. Procedure.

(a) Generally.

Illustrations.

(1) The petition had to stand over, to enable those entitled in remainder to be joined, in *In re Collis* (1866), 14 L. T. 352 ; and *ante*, p. 438.

(2) To a petition by the tenant for life for investment and payment of dividends the remainderman was made a respondent :—*Held*, that this was proper, and that the costs of his appearance were ordered to be paid by the company, by whom the premises had been taken : *In re Crane's Estate* (1869), L. R. 7 Eq. 322.

(3) When the tenant for life claims part of the fund under sect. 73 of the Lands Clauses Act, the remainderman should be made a co-petitioner : *In re Strathmore* (1874), L. R. 18 Eq. 338.

(b) Land held in undivided shares.

Illustration.

When a public company took land held in undivided shares, each part-owner who had in good faith employed a separate solicitor was *held* entitled to his costs of obtaining his share of the purchase-money ; but where two or more of such part-owners had employed the same solicitor, they were, except in special circumstances, entitled to only one set of costs : *In re Nicholls' Trust Estates* (1866), 35 L. J. Ch. 516.

74. Where any Purchase Money or Compensation paid into the Bank under the Provisions of this or the Special Act shall have been paid in respect of any Lease for a Life or Lives or Years, or for a Life or Lives and Years, or any Estate in Lands less than the whole Fee Simple thereof, or of any Reversion dependent on any such Lease or Estate, it shall be lawful for the Court of Chancery *in England or the Court of Exchequer in Ireland*, on the Petition of any Party interested in such Money, to order that the same shall be laid out, invested, accumulated, and paid in such Manner as the said Court may consider will give to the Parties interested in such Money the same Benefit therefrom as they might lawfully have had from the Lease, Estate, or Reversion in respect of which such Money shall have been paid, or as near thereto as may be.

Court of Chancery may direct Application of Money in respect of Leases or Reversions as they may think just.

[The words in italics were repealed by the Statute Law Revision Act, 1892.]

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I. Application of the section.

The section applies when money is paid into court under the Lands Clauses Act or the special Act in respect of—

An lease ;

An estate of land less than the fee simple ; or

An reversion dependent on such lease or estate.

(*a*) The section does not apply to a yearly tenant who has received notice to quit and, without consent, holds over.

Illustration.

The owner of freehold land which was in the occupation of a yearly tenant contracted to sell it to the Corporation of M. for a sum of money, which was paid into court. The tenant received due notice from the owner to quit at the end of six months, but he continued in possession without the consent of either the vendor or the purchasers:—*Held*, that he was not entitled to any part of the purchase-money as compensation for his interest in the property: *Ex parte Nadin* (1848), 17 L. J. Ch. 421.

(*b*) A tenancy which at the option of the tenant may continue during the term or interest of the landlord is within the section.

Illustration.

A railway company contracted to purchase the interest of B. in certain premises which he held under A., who had agreed to let B. remain in possession for such term of years (not exceeding A.'s term) as B. might desire to continue tenant. B. described his interest as "held for any term at tenant's option, but not beyond the term and interest of A., which term will expire in 1881." The company having paid the purchase-money into court:—*Held*, that B. was entitled to the same, as he was not a mere tenant from year to year, but was entitled to retain possession as long as A.'s interest existed: *In re King, Ex parte East London Ry.* (1873), L. R. 16 Eq. 521.

(*c*) Renewable leaseholds are also within the section.

Illustration.

Leaseholds belonging to the Dean and Chapter of W., renewable by custom though not as of right, were held upon the trusts of a settlement. Notices to treat were given

by the M. D. Railway Co. in respect of parts of the leaseholds; and shortly after the dates of the notices the dean and chapter ceased to renew leases. The purchase-moneys were paid into court and dealt with under this section: *In re Wood's Estate* (1870), L. R. 10 Eq. 572.

(d) Where compensation is paid in respect of minerals on a settled estate which a railway company require to be left for the support of their line, the tenant for life is intitled to an apportioned part thereof where the minerals are not of such extent that they could not possibly have been got during the lifetime of the existing tenant for life.

Illustration.

B. was owner in fee of mines, but not of the surface. B. devised the mines to V. for life without impeachment of waste, remainder to L. for life without impeachment of waste, with remainders over. During V.'s life and after her death neighbouring coal-owners inadvertently trespassed and took coal from these mines and paid a sum as compensation therefor:—*Held*, that so much of this sum as represented coal taken during V.'s life belonged to her estate and the remainder to L. The railway ran over part of the mines. L.'s lessee gave notice to the company of his intention to work the minerals under and adjacent to the railway. The company gave a counter-notice, and the value of these minerals was assessed and paid; part of the compensation was apportioned as paid for the interest of the lessor:—*Held* that, as the coal in question might have been gotten during L.'s lifetime, he was entitled to the compensation money: *In re Barrington, Gamlen v. Lyon* (1886), 33 Ch. D. 523; distinguished in *In re Robinson's Settlement, infra*.

NOTE.—Where the subject-matter of the sale to a railway company did not come within the definition of the interests dealt with by sect. 74—that is, the taking of lands when “less than the whole fee simple thereof” is acquired—no apportionment can be directed under sect. 69, and a tenant for life, without impeachment of waste, is not entitled to any part of the compensation money paid for minerals lying under settled land, although the whole of such minerals could probably have been worked out during his life, and although part of them would, in fact, have been worked out during the five years which elapsed between the notice of intention to work and the actual sale to the railway company: *In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129.

II. Disposal of purchase-money under sect. 74.

(a) Where settled leaseholds are taken, the tenant for life is entitled to such yearly sum out of the invested purchase-money and interest thereon as will exhaust the fund in the number of years which the lease had to run.

Illustrations.

(1) A testator gave leaseholds and some other property to his widow for life, with remainders over. Part of the leasehold property was taken by a railway company, and the purchase-money was afterwards invested and the dividends paid to the widow for life. Upon her death it was *held* (her representatives assenting to take it) that her estate was entitled, out of the invested fund, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life if the premises had not been taken: *Jeffreys v. Conner* (1860), 28 Beav. 328.

NOTE.—This order was made by consent and, since the decision of the Court of Appeal in *Askew v. Woodhead*, 14 Ch. D. 27, cannot be considered as an authority.

(2) Leaseholds limited to one for life, with remainder to another, were purchased under statutory powers. The purchase-money was ordered to be divided according to the number of years of the lease remaining unexpired at the time when the promoters took the land and the representatives of the tenant for life were *held* entitled to the part in respect of the years during which the tenant for life lived, the balance going to the remainderman : *In re Money* (1862), 2 Dr. & Sm. 94.

(3) A testator devised and bequeathed all his real and personal property to trustees upon trust, during the life of C., to take the sum of 200*l.* per annum, free of all deductions, and to invest the same, and to stand possessed of the interest and dividends thereof and to invest the same as they became payable, and to stand possessed of such funds and the accumulations thereof upon trust for such of his children as should attain twenty-one years of age, and that the trustees should further stand possessed of the remainder of the interest and dividends of his realty and personalty upon trust to pay the same to C. during her life, and after her death for the testator's children who attained twenty-one. Part of the leasehold property consisted of a piece of ground with a house thereon, which was taken by a railway company and the purchase-money paid into court :—*Held*, that the invested purchase-money, or so much as from time to time remained, and the interest thereon should in each year be divided by the number of years which would have remained yet unexpired of the lease had it still existed, and that the amount of the quotient should be paid yearly to C. : *Littlewood v. Pattison* (1864), 10 Jur. (N.S.) 875.

(4) B. by his will gave a leasehold house to his wife for life, with remainders over. The net yearly income from the property was about 21*l.* A railway company took the property when there were about thirty-nine years of the term to run, and paid the awarded value, 295*l.*, into court. This was not enough to produce a yearly income of 21*l.* The Court refused to make an order for the payment of the full amount out of capital and dividends, but, on the petitioner agreeing to take 18*l.* a year, directed payment of that amount : *Ex parte London, Brighton and South Coast Ry., In re Birch* (1864), 10 Jur. (N.S.) 673. [This was a consent order, and cannot be considered as an authority.]

(5) P. bequeathed a leasehold to his executors, upon trust to permit his sons "to hold, use, occupy and enjoy" the premises "so long as they may carry on the business together therein, as now carried on by me and them in partnership." The sons were to pay a low rent to the executors, who were to pay to the lessor the rent reserved to him. The will further directed that if his sons or either of them should "decline" to carry on the business on the premises, the executors were to sell the same or lease till sale. The property was taken under statutory powers :—*Held*, that P.'s sons were entitled to the present value of the difference between the actual rent paid by them and the market value of the premises for the term of their lives and of that of the survivor of them subject to a deduction for the chance of their ceasing to carry on the business : *Penny v. Penny* (1867), L. R. 5 Eq. 227.

(6) P. had a leasehold for life, with remainder over. The property was taken under statutory powers and compensation assessed at a sum which, invested in Consols, would produce a smaller income than that derived from the leasehold. The Court directed that if the fund would purchase a Government annuity for the unexpired term of the amount of the income formerly derived from the leasehold the money should be laid out accordingly ; if not, that the dividends on the Consols for the time being should be paid to P. for life, and also half-yearly half the quotient of the Consols divided by the number of years the lease would have had to run. It being found, however, that a Government annuity could not be purchased in the name of the Accountant-General, it was directed that a life annuity should be purchased for P. and the remainder of the fund invested and the interest accumulated during her life : *In re Pfleger* (1868), L. R. 6 Eq. 426.

NOTE.—In *Askew v. Woodhead* (*post*) Cotton, L.J., said :—"In *In re Pfleger*, Vice-Chancellor Giffard directed an annuity to be purchased for the life of the petitioner,

so as to give her the same income as before, but as she thus received more than she would have received if the fund had been invested in an annuity to last as long as the term, the case decides nothing in favour of the respondents."

(7) By his will W. P. bequeathed leaseholds to trustees upon trust for his son F. T. P. for life, with a proviso for forfeiture on bankruptcy or alienation, and after his death or the determination of his interest in trust for his children. The leaseholds were taken and the purchase-money, 680*l.*, paid into court. Romilly, M.R., directed it to be referred to an actuary to ascertain what ought to be paid every year to the tenant for life out of capital and income, the fund being invested in the names of the trustees and such yearly payments to be made to the tenant for life as the actuary found to be proper: *In re Phillips' Trust* (1868), L. R. 6 Eq. 250.

NOTE.—This case was approved in the later case of *Askew v. Woodhead*, *infra*.

(8) When a railway company took lands of leasehold tenure in the occupation of a tenant for life, and it appeared that if the lands had not been taken they would have let at a higher rent than the rent at the time of the taking, the Court allowed a slight addition to be made to the amount of the original rent by way of income for the tenant for life out of the purchase-money: *In re North's Estate* (1868), 19 L. T. 43.

(9) A testator bequeathed (*inter alia*) his leasehold property to trustees to sell, according to their absolute discretion, for the purpose of paying and discharging all his mortgage and other debts. Nearly twenty years later part of the leasehold property was taken under statutory powers and the purchase-money paid into court:—*Held*, that the tenant for life was entitled to such an annual payment out of the purchase-money invested in Consols, with the dividends thereon, as would exhaust the whole fund invested and the dividends thereon, at the date of the expiration of the lease, such annual payment to be ascertained by an actuary: *In re Sewell's Trusts* (1871), 23 L. T. 835.

(10) Under a marriage settlement A. had a life interest in leaseholds having eight years to run. The average income was 137*l.* The S. Corporation bought the property under the Lands Clauses Act and paid 1,550*l.* compensation:—*Held*, that A. was entitled to an annuity which would exhaust the fund in eight years: *Askew v. Woodhead* (1879), 14 Ch. D. 27. "I will first consider the simple case of a leasehold settled upon a person for life, with a limitation over on his death to another person absolutely. When a property so circumstanced is purchased by a company what mode of dealing with the purchase-money will give the parties interested the same benefit as nearly as may be as they would have had from the lease? This result would clearly be attained by investing the money in the purchase of an annuity having as many years to run as there were years remaining in the term, and by paying it to the tenant for life, and after his death, if the tenant for life dies within the term, then to the remainder man. Generally, an annuity cannot thus be purchased which will bring in as large an income as the leasehold, but sometimes it can. The same principle, however, must apply whether the income is more or less. If an annuity is not actually bought it must be referred to an actuary to calculate what yearly sum, if raised out of the dividends and *corpus* of the fund, will exhaust the fund in the number of years which the lease had to run, and the amount so ascertained must be paid to the tenant for life": *per* Jessel, M.R., at p. 34, *ib.*

(11) Where leasehold property, held for an unexpired term of years, was sold under the Settled Estates Act, 1877, and the tenant for life suffered by reason of the sale a diminution of income, the Court, applying the principle of *Askew v. Woodhead* (*ante*), directed a calculation to be obtained from an actuary of what equal half-yearly sums, for the residue of the term, the proceeds of the sale would produce, taking interest at 3 per cent., so as to exhaust that sum at the expiration of the term, and that in each half-year the dividends on the stock then remaining, in which the proceeds of sale were invested, should be paid

to the tenant for life, and so much of the stock transferred to the same person as, with the cash dividend, would make up the half-yearly sum so to be ascertained, the residue of the fund, if any, at the expiration of the life interests to go to the persons absolutely entitled in remainder. Costs as between solicitor and client were allowed of the application for compensation : *In re Walsh's Trusts* (1881), 7 L. R. Ir. 554.

(12) H. by his will gave leasehold property to J. for life, with remainders over. Part of the leaseholds was taken under statutory powers, and the income of the purchase-money, when invested, was paid to J. for life or until further order. Those entitled in remainder having died before J., his next of kin became entitled to the fund upon his death :—*Held*, by Kay, J., that the law had been settled by the decision in *Askew v. Woodhead* (*ante*), and that he could, notwithstanding the order made on a previous occasion, divide the fund among the representatives of J. and his next of kin upon the principle laid down in that case : *In re Hunt's Estate* [1884] W. N. 181.

(13) B. was tenant for life of a leasehold hotel with remainder to E. A railway company purchased the property for their undertaking. The compensation was assessed by arbitration at 451*l.* for the leasehold and 800*l.* for severance, &c., including loss of trade profits. B. and one claiming under E. traversed the award, and by agreement between B. and the company the 451*l.* was increased to 901*l.* and the 800*l.* to 1,599*l.*, and it was further agreed that the 1,599*l.* should be paid to B. in respect of her trade disturbances in the premises :—*Held* that, under the circumstances, the 799*l.* by which the 800*l.* had been increased under the agreement was personal compensation to which B. was entitled ; that the 800*l.* must be taken to be part of the compensation for taking the leasehold, and together with the 901*l.* be dealt with on the principle laid down in *In re Walsh's Trusts*, *supra* : *In re South City Market, Ex parte Bergin* (1884), 13 L. R. Ir. 245.

(b) If the lease terminates during the lifetime of the tenant for life, he is entitled to the *corpus* of the purchase-money.

Illustrations.

(1) A term of years was bequeathed to a legatee for life, with remainder over, and the legatee for life, having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survived the duration of the term :—*Held*, that the legatee for life, and not the legatee in remainder, was entitled to the stock, although the latter was not a party to the sale : *Phillips v. Sarjent* (1848), 7 Hare, 33.

(2) Where a term of years came to an end during the life of the tenant for life, who had been in receipt only of the income, and afterwards of the dividends of the compensation money paid by a railway company, she was *held* entitled to the *corpus* of the compensation money, but without prejudice to any rights the remaindermen might have to relief as to the non-renewal of the lease, according to the testator's directions : *In re Beaufoy's Estate, In re Oxford, Worcester and Wolverhampton Ry.* (1852), 1 Sm. & G. 20.

(c) Where the leaseholds are renewable, the tenant for life is entitled only to the income of the fund.

Illustration.

Trustees held leaseholds from a dean and chapter upon trust for a tenant for life, with remainder over. There was a custom, but not a right, to have the leases renewed on payment of a fine, and the trustees were directed two years before the time for renewal to reserve part of the rental to provide for payment of the fine. In June, 1865, and

February, 1866, the M. Railway Co. gave notice to treat; about Lady Day, 1866, the custom of renewing leases ceased, and the fee was vested in the Ecclesiastical Commissioners. The dividends produced by the compensation money was less than the income previously produced by the property :—*Held*, that the tenant for life was only entitled to the dividends produced by the fund : *In re Wood's Estate* (1870), L. R. 10 Eq. 572; followed in *In re Barber's Settled Estates*, *post*. “The result, in my opinion, of the purchase by the railway company is that one property in perpetuity is substituted for another property in perpetuity; and that, as between the tenant for life and the remainderman, I cannot take away any part of the *corpus* belonging to the latter in order to make good the diminished income of the former”: *per* James, V.-C., at p. 584, *ib.*; *Morris v. Hodges* (1860), 27 Beav. 625, and *Tardiff v. Robinson* (1819), 27 Beav. 629, *n.* distinguished.

The principle is shown in the following case :—

Illustration.

B. devised leaseholds for lives on trust for J. in fee, but if he should die without leaving issue living, then to W. in fee; there was a trust to renew the leases out of the rents. After B.'s death the reversioner refused to renew, and the lease was sold under the Settled Estates Act :—*Held* that, as there was a trust for the purpose of creating a perpetuity, and by force of the powers in the Settled Estates Act it was converted into a perpetuity of another kind, the fund should be invested in ordinary securities and the interest, and no more, paid to J. : *In re Barber's Settled Estates* (1881), 18 Ch. D. 624.

(d) If the leaseholds are subject to payment of an annuity, the annuitant is entitled to payment in full; and for this purpose, if necessary, portions of the *corpus* must from time to time be sold.

Illustrations.

(1) Leaseholds were bequeathed, upon trust, out of the rents and profits to pay an annuity of 52*l.* for the life of the annuitant, and, “subject and without prejudice to the annuity,” were bequeathed upon other trusts, but without any trust for sale. They were purchased by a railway company under the provisions of the Lands Clauses Act, and the proceeds were paid into court, but the income was not enough to pay the annuity :—*Held*, that portions of the *corpus* ought to be sold to satisfy, from time to time, the growing payments : *Ex parte Wilkinson, In re London, Brighton and South Coast Ry.* (1849), 3 De G. & Sm. 633.

(2) T. being entitled to a moiety in certain leaseholds, that interest was settled on her marriage (after reserving 40*l.* a year thereout) on herself and husband and children. The M. Board of Works took the property under statutory powers and paid the value thereof into court. Upon petition to deal with the fund, it was ordered that enough of the purchase-money should be invested to produce the 40*l.* a year, and the residue being also invested, and there being six and a quarter years of the lease to run, two twenty-fifths should be sold every half-year and paid to T. for her life, together with the dividends : *In re Treacher's Settlement* (1868), 18 L. T. 810.

(e) When settled land subject to a beneficial lease is taken, the tenant for life of the land is only entitled during the continuance of the term created by the lease to so much of the income of the investments.

representing the purchase-money of the land as is equal to the amount of the rent which he would have received under the lease in case the land had not been taken. The rest of the income must be invested and accumulated for the benefit of the inheritance of the settled land until the date of the expiration of the term. After that date the tenant for life is entitled to the whole of the income.

Illustrations.

(1) S. let land on lease at a rent less than a rack rental in consideration of a covenant to expend a certain sum of money on the estate. S. devised the land to A. for life, with remainder over to B. A railway company purchased the interests of A. and B. subject to the lease:—*Held*, that A. was entitled to the whole of the dividends of the purchase-money: *In re Steward's Estate, Ex parte Briscoe* (1853), 1 Drew. 636.

(2) Land taken under statutory powers was subject to a building lease which had been granted in consideration of an outlay in building at less than rack rent, and of which eleven years were unexpired, and the compensation money for the reversion, subject to such lease, was paid into court. Kindersley, V.-C., said: "The only loss occasioned to her [the tenant for life] by the taking of the land is a loss of 10*l.* a year income, for it is not a case of a person in occupation of premises being turned out of that occupation. It is quite clear that, unless there be an accumulation of some portion of the income, there will not, at the determination of the lease, be in court such a sum as will represent the value of the whole fee, and it appears to me that there ought to be an accumulation of all the income, except so much thereof as is necessary to compensate the tenant for life for the loss she sustains by reason of the land being taken. . . . The fund must be invested, and the petitioner must be declared to be entitled to 10*l.* a year out of the income, the remainder of which must be accumulated": *In re Wootton's Estate* (1866), L. R. 1 Eq. at p. 591. This case was followed in *In re Mette, post*; and approved in *Cottrell v. Cottrell, post*.

(3) M. by his will gave land to E. for life, remainder over in fee. M. died in 1838. In 1859 E. and the remainderman joined in demising part of the property for twenty-one years at what was then a rack rent of 84*l.* In 1868 the demised property was taken under statutory powers and the purchase-money, which when invested would yield 200*l.* a year, was paid into court:—*Held*, that the tenant for life was entitled only to 84*l.* a year during the residue of the term, and that the surplus income during that term must be accumulated and invested: *In re Mette* (1868), L. R. 7 Eq. 72; approved in *Cottrell v. Cottrell, post*.

(4) M. gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was, in practice, renewed every seven years on payment of a fine, upon trust to renew out of the proceeds and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest. A renewal fund had been raised out of the income, but the lease ceased to be renewable:—*Held*, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income: *Maddy v. Hale* (1876), 3 Ch. D. 327; followed in *In re Barber's Settled Estates, ante*, p. 448.

(5) W. devised freeholds to R. for life, with remainders over. The will contained powers of leasing—part of the land had been leased by W., part by the trustees, and part by R. The leases contained covenants by the lessees to repair. The lands leased were taken by a railway company under statutory powers, and the compensation money, which included

10 per cent. for compulsory sale, was paid into court, and produced a larger income than the rents reserved by the leases :—*Held*, that the tenant for life was only entitled to the net amount of the rentals during the unexpired terms, that the remainder of the income should be accumulated, and that on the expiry of the term of each lease the income of so much of the fund as represented that particular lease, including a proportionate share of the accumulations, should be paid to the tenant for life : *In re Wilkes' Estate* (1880), 16 Ch. D. 597 ; approved in *Cottrell v. Cottrell*, *post*.

(6) A railway company took freeholds, settled by a will and subject to leases at beneficial rents, made by the tenant for life. The company paid the purchase-money into court, and the lands were conveyed to them subject to the leases. The tenant for life made an arrangement with the lessees that they were to continue to pay the same rent as before, although parts of the properties leased had been taken by the company. The tenant for life presented a petition asking for the investment of the money in court, and the payment of the dividends to her :—*Held*, that the Court would not allow the tenant for life to derive any benefit (following *In re Wilkes' Estate*, *ante*) from the purchase by the company, and that she could not receive the dividends on the purchase-money during the continuance of the leases, but that they must be accumulated. As each lease fell in the tenant for life would be entitled to so much of the dividends as was produced by the purchase-money of the land comprised in the lease which had fallen in, as also the income of the accumulations of the past dividends of such portion of the purchase-money : *In re Griffith's Will* (1883), 49 L. T. 161.

(7) T. by his will devised to trustees certain hereditaments upon trust to pay the rents and profits to C. during her life, and, after her death, in trust for such of her children as, being sons, should attain twenty-one years of age, or, being daughters, should attain that age or marry. The property was subject to a lease for sixty years from July 19th, 1851, at a yearly rent of 200*l.* ; and in March, 1884, was sold under the provisions of the Settled Land Act and the purchase-money invested by the trustees. C. now petitioned that the trustees might be directed to pay the whole income of the investment arising from the purchase-money to her during her life :—*Held*, that C. was entitled only to so much of the income of the purchase-money invested as was equal to the rent under the lease, and that the rest of the income must be accumulated and invested for the benefit of the inheritance until the time when the lease would have expired : *Cottrell v. Cottrell* (1885), 28 Ch. D. 628 ; and see *In re Bowyer* [1892] W. N. 48.

(*f*) Similar principles have been applied in cases relating to ecclesiastical property.

Illustrations.

(1) Where the rector of L. was seised to himself and his successors of certain property which had been demised for a long term at a nominal rent, the Court directed the investment and accumulation during the residue of the term of the sum paid by way of compensation, with liberty to apply when the lease expired : *Ex parte Lambeth (Rector)* (1846), 4 Rail. Cas. 231. In this case payment of the dividends to the rector and his successors was not allowed.

(2) The Dean and Chapter of Lincoln and their lessee entered into a joint contract for the sale of part of the demised property for a lump sum. The company paid the money into court, but the Vice-Chancellor declined to apportion the fund, and the money was ordered to be invested and the dividends to be paid during the residue of the term to the lessee, he undertaking to pay the rent reserved by the lease : *Ex parte Ward* (1848), 2 De G. & Sm. 4.

(3) Land belonging to a dean and chapter, which was subject to a lease granted by them, having been taken under statutory powers, a petition was presented by the dean

and chapter for the investment of the purchase-money and payment of the dividend to them:—*Held*, by Knight Bruce, V.-C., that, after providing for the payment to the dean and chapter of the rent reserved, if such a provision were necessary, the remainder of the dividends ought to be accumulated until the expiration of the lease and added to the principal: *Ex parte Gloucester (Dean)* (1850), 19 L. J. Ch. 400.

(4) Land belonging to the Dean and Chapter of Christchurch, but subject to a lease, was purchased by a railway company and the money paid into court:—*Held*, that the dean and chapter were entitled, during the continuance of the lease, only to so much of the dividends of the purchase-money as would equal the amount of rent, and the balance of the dividends was to be accumulated until the expiry of the lease: *Ex parte Christchurch (Dean)* (1853), 23 L. J. Ch. 149.

(5) Land forming part of a glebe, and which was subject to a lease granted by the Dean of B., was taken under statutory powers and the purchase-money paid into court. Upon presentation of a petition for payment of the dividends of the money to the dean for the time being:—*Held*, that the dean was entitled only to the full annual value of the property for the residue of the term, and that the remainder of the dividends must accumulate: *Ex parte Battle (Dean)* (1853), 1 W. R. 271.

(6) Leasehold land belonging to a see was taken under statutory powers and the purchase-money paid into court. Upon a petition asking for payment of the dividends to the bishop and his successors:—*Held* that, the bishop being the reversioner only, he was not entitled to the dividends until the lease expired: *In re Bath and Wells (Bishop)* (1853), 2 W. R. 1.

(7) Leasehold lands of which the Archbishop of Canterbury was possessed in right of his archbishopric were taken by a railway company. The proceeds of sale were ordered to be invested, and such portion of the dividends as was equal to the rents was ordered to be paid to the archbishop for life and the residue to be reinvested until the expiration of the leases, when liberty was given to the archbishop to apply: *In re Wimbledon and Croydon Ry., Ex parte The Archbishop of Canterbury* (1854), 23 L. T. (O.S.) 219.

(g) A similar principle is applied in the case of minerals.

Illustration.

A sum of money having been paid to the trustees of settled land as compensation for coal left for support, the question arose as to the proper mode of apportioning the money between the tenant for life and the remainderman. The tenant for life was entitled to dead rent and royalties under a lease of the coal. The lessee had received separate compensation:—*Held*, that the money was not payable to the tenant for life as a lump sum, but that he was entitled to something more than the mere interest on the money. The principle of apportionment applicable was to treat the money as rent accruing *de die in diem* to the tenant for life for the unexpired residue of the lease, or for a less period if the coal would have been worked out in a shorter period: *Cardigan v. Curzon Howe* (1898), 14 T. L. R. 550.

(h) Where in the case of church lands subject to leases the rents are small ground rents, and an ecclesiastical corporation has a right to the fines payable periodically for renewals, the purchase-money will be retained in court and accumulated, and there will be an inquiry directed at each period when a renewal might have taken place to ascertain and authorise the payment to the corporation of a sum equivalent to the amount of the fine.

Illustrations.

(1) The Bishop of Winchester, as lessor of lands of the see demised for lives and years, the leases being renewable on payment of fines, was *held* not to be entitled to any part of a sum paid into court as purchase-money and compensation for damage and severance, or to the dividends of such money when invested, until the leases should become renewable; on which event he might apply to have the deficiency of the fine paid out of the fund: *Ex parte Winchester (Bishop)* (1852), 10 Hare, 137.

(2) Lands vested in the Precentor of St. Paul's for the time being were demised by him and were subject to a customary right of renewal. Being taken under statutory powers:—*Held* that, upon the occurrence of every period at which, if the land had not been taken, the lease might have been renewed, the Court might direct the payment out of the fund in court (arising from the purchase-money and its accumulations) of a sum equivalent to the fine payable upon such renewals: *Ex parte St. Paul's (Precentor)* (1855), 1 K. & J. 538.

(3) The Chapter of W. were lessees of lands. The leases were renewable every seven years on payment of a fine. A company gave notice to take the lands, and consequently the lease was not renewed; subsequently another company took the lands and paid the purchase-money into court:—*Held*, that the chapter were not entitled to any part of the purchase-money as compensation for the fine which they had lost: *Ex parte Westminster (Dean)* (1854), 18 Jur. 1113.

(4) Real estate belonging to an ecclesiastical corporation (subject to a lease at an ancient rent with a fine upon renewal) was taken by a public authority and the purchase-money paid into court:—*Held*, that the corporation was entitled to so much only of the dividends as was equal to the rent reserved by the lease, with liberty, however, to apply as to the accumulated residue for the amount which would have become due in respect of fines if the property had not been taken: *Ex parte St. Paul's (Dean)* (1863), 11 W. R. 482.

(k) The Court, in the exercise of its discretion, will sometimes depart from the above rule, where there is no object in accumulating the dividends.

Illustration.

Where purchase-money had been paid into court in respect of lands vested in charity trustees, subject to leases for years dependent on lives, the Court, in the exercise of its discretion under sect. 74, ordered the money to be invested and the dividends to be paid to the trustees instead of being accumulated, for there seemed to be no object in accumulating the dividends: *Ex parte St. Thomas's Church Lands, Bristol (Trustees)* (1870), 23 L. T. 135.

(l) Where land subject to leases is taken and compensation is assessed on the principle that the lessees are to continue to pay to the landowners the whole of the rents reserved by the leases during the remainder of the subsisting terms, the dividends on the investments representing the purchase-money will not be accumulated, but will be paid to the landowners.

Illustration.

A railway company took lands of which the Dean and Chapter of W. were seised in fee simple, subject to certain leases. Compensation was assessed on the principle that the tenants were to continue to pay to the dean and chapter the whole of the rents reserved by the leases during the remainders of the terms. It was *held* that the value of the property must be considered as having been computed as if the purchase had been made of the fee

simple in possession, and that the dividends of the investments representing the purchase-money must be paid to the dean and chapter : *In re The Hampstead Junction Ry.* (1858), 28 L. J. Ch. 144 ; 26 Beav. 214.

III. Procedure.

(a) Money paid into court in respect of settled leaseholds which have been taken compulsorily may be reinvested in the purchase of copyholds or in the purchase of a reversion in fee of other leaseholds.

Illustrations.

(1) Settled leaseholds were taken by the Liverpool Dock Trustees under their statutory powers and the purchase and compensation money paid into court. On the petition by the tenant for life for the reinvestment of the money in copyholds of inheritance, the master reported that such an investment would be for the benefit of all parties. The Court made the order, the copyholds to be vested in two trustees : *In re Coyte's Estate* (1851), 1 Sim. (N.S.) 202.

(2) A sum of money, part of the produce of certain leasehold premises taken by a railway company, was paid into court, the owners of the property being infants. On a petition by them asking for the investment of the fund in court in the purchase of the absolute reversion in fee simple of other leaseholds belonging to the same parties, the Court made the order asked for, and directed that the land purchased should be conveyed to a trustee in trust for the persons interested, their executors and administrators, until they should attain twenty-one, and afterwards to them and their heirs : *In re Brasher's Trust* (1858), 6 W. R. 406.

(3) Leaseholds were bequeathed to W. P. for life, and after his death upon trust for his children. Certain lands comprised in the leases were taken by a railway company. Part of the purchase-money was invested in land, and the Court made an order sanctioning the reinvestment of the balance in freeholds : *In re Parker's Estate* (1872), L. R. 13 Eq. 495.

(b) A remainderman being a "person interested" within the meaning of this section is a proper party to applications under it.

Illustration.

Cash paid into court by a railway company represented the purchase-money of houses let on lease at a rack rent. On a petition by the tenant for life for investment and payment of dividends, it appeared that the income of the proposed investments would not amount to as much as the yearly rent of the houses. The remainderman had been made a respondent to the petition, and it was held that the company must pay his costs : *In re Crane's Estate* (1859), L. R. 7 Eq. 322.

See, further, as to practice on application for reinvestment, sects. 70 (*ante*) and 80 (*post*).

75. Upon Deposit being made, the Owners of the Lands to convey, or in default the Lands to vest in the Promoters of the Undertaking upon a Deed Poll being executed.

75. Upon Deposit in the Bank in manner herein-before provided of the Purchase-Money or Compensation agreed or awarded to be paid in respect of any Lands purchased or taken by the Promoters of the Undertaking, under the Provisions of this or the Special Act or any Act incorporated therewith, the Owner of such Lands, including in such Term all Parties by this Act enabled

to sell or convey Lands, shall when required so to do by the Promoters of the Undertaking, duly convey such Lands to the Promoters of the Undertaking, or as they shall direct ; and in default thereof, or if he fail to adduce a good Title to such Lands to their Satisfaction, it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll under their Common Seal if they be a Corporation, or if they be not a Corporation under the Hands and Seals of the Promoters, or any Two of them, containing a Description of the Lands in respect of which such Default shall be made, and reciting the Purchase or taking thereof by the Promoters of the Undertaking, and the Names of the Parties from whom the same were purchased or taken, and the Deposit made in respect thereof, and declaring the Fact of such Default having been made, and such Deed Poll shall be stamped with the Stamp Duty which would have been payable upon a Conveyance to the Promoters of the Undertaking of the Lands described therein ; and thereupon all the Estate and Interest in such Lands of or capable of being sold and conveyed by the Party between whom and the Promoters of the Undertaking such agreement shall have been come to, or as between whom and the Promoters of the Undertaking such Purchase Money or Compensation shall have been determined by a Jury, or by Arbitrators, or by a Surveyor appointed by two Justices as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the Promoters of the Undertaking, and as against such Parties, and all Parties on behalf of whom they are herein-before enabled to sell and convey, the Promoters of the Undertaking shall be entitled to immediate Possession of such Lands.

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I. The object of the section.

Illustration.

The object is described by Lord Watson in *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. at p. 501 : "Save for the special provisions made in that behalf, promoters taking lands by compulsion, in terms of the Act of 1845, could not have got possession until they paid the price, nor would they have been in safety to part with the price until they got a conveyance from someone having a clear title. To obviate the inconveniences which might have arisen from that state of matters, enactments were introduced with the view of enabling the promoters of an undertaking, after ascertainment of the purchase-money or compensation, to obtain immediate possession of lands taken by compulsory purchase, in cases where the owners are absent from the kingdom or cannot be found, as well as in the case of an owner refusing to convey, or failing to adduce a good and satisfactory title. In these cases it is provided (sects. 75 and 77) that the promoters, upon their complying with the conditions which the Act prescribes as to deposit of the price, 'shall be entitled to immediate possession of such lands.' It does not, in my opinion, admit of dispute that possession taken by the promoters in virtue of these provisions of the Act is in all respects equivalent to possession voluntarily given to a purchaser under a completed contract of sale."

II. The circumstance that this section provides for the conveyance to the promoters, or the execution of a deed poll, upon "deposit of the purchase-money" without mentioning interest, does not deprive a vendor of interest in a case where he is entitled to it.

Illustration.

"The mere fact, therefore, of the Act directing a conveyance on payment of the purchase-money without saying anything as to payment of interest does not, to my mind, preclude the application of the general law as to the liability of the purchaser to pay interest in a proper case; and it does appear to me that to decide otherwise would be to commit something like a great injustice": *per* Jessel, M.R., in *In re Piggott and the Great Western Ry.* (1881), 18 Ch. D. at p. 153.

III. But the Court has no jurisdiction to make any order as to payment of interest on purchase-money deposited.

Illustrations.

(1) A railway company who were unable to obtain a conveyance of land taken under compulsory powers paid the money into court and executed a deed poll. On a petition for dealing with the fund in court, the vendor claimed interest on the purchase-money. It was *held* that there was no jurisdiction to make any order as to interest: *In re Crystal Palace Ry.* (1853), 1 Jur. (N.S.) 995.

(2) The Metropolitan Board of Works gave T. notice to treat for his premises, and T. subsequently entered into agreements with tenants in order to enable them to claim compensation against the Board. An arbitrator awarded T. 1,381*l.*, which the Board paid into court in consequence of the agreements with the tenants, and, having executed a deed poll under the 77th section, the Board took possession of the premises in December, 1870. T. presented a petition that the fund might be paid to him with interest at 5 per cent. from October 19th, 1870, and costs. Vice-Chancellor Wickens said that as it was T.'s attempt to get something more out of the Board that caused the payment of the money into court, he should refuse to give T. any costs; and as to interest, he had no power to make the Board pay any, and, if he had, he should not exercise it on behalf of T.: *In re Marylebone Improvement Act*, 1868, *Ex parte Topple* [1871] W.N. 191.

Where parties
refuse to convey,
or do not show
Title, or cannot be
found, the Purchase
Money to be
deposited.

76. If the Owner of any such Lands purchased or taken by the Promoters of the Undertaking, or of any Interest therein, on Tender of the Purchase Money or Compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a Title to such Lands, or to the Interest therein claimed by him, to the Satisfaction of the Promoters of the Undertaking, or if he refuse to convey or release such Lands as directed by the Promoters of the Undertaking, or if any such Owner be absent from the Kingdom, or cannot after diligent Inquiry be found, or fail to appear on the Inquiry before a Jury, as herein provided for, it shall be lawful for the Promoters of the Undertaking to deposit the Purchase Money or Compensation payable in respect of such Lands, or any Interest therein, in the Bank, in the Name and with the Privity of the Accountant General of the Court of Chancery *in England or the Court of Exchequer in Ireland*, to be placed, except in the Cases herein otherwise provided for, to his Account there, to the Credit of the Parties interested in such Lands (describing them so far as the Promoters of the Undertaking can do), subject to the Control and Disposition of the said Court.

[The words in italics were repealed by the Statute Law Revision Act, 1892.]

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I. Who is an "owner."

(a) By the term "owner" in sect. 76 the Legislature means a person having *some* title to the lands in question.

Illustration.

A surviving partner, D., selling partnership lands in discharge of his duty as survivor to wind up the partnership is an "owner" within sect. 76; and *held* that, by virtue of that and sect. 77, the promoters of the undertaking, upon depositing the purchase-money in the bank to the credit of the vendor and of the representative of his deceased partner, acquired the estate and interest of both: *Douglass v. London and North-Western Ry.* (1857), 3 K. & J. 173. "What, then, is the class of cases which the Legislature had in contemplation in making the provision for the event of an owner of lands failing to make out a title to the satisfaction of the promoters? To ascertain this, I look to the 7th section of the Act. The 7th section provides that it shall be lawful for all parties being seised, possessed of or entitled to any such lands as there mentioned or any estate or interest therein, to sell and convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose, whether they be trustees or feoffees for charitable or other purposes, and so on. Those, therefore, are the persons referred to in the 76th section as the 'owners' of lands to be taken or of any interest therein. The 'owner' must have some title. Now, suppose the land in the hands of such an owner to be subject to dower, or to a rent-charge by way of jointure, or to any other independent estate or interest outstanding in a third party, who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title,—in such a case the Court would consider the objection to be one, not of conveyance, but of title, and the certificate would be against the title, because the 'owner' would have no control over the person in whom the supposed estate or interest is outstanding. In such a case the 76th section is directly applicable:" *per* Lord Hatherley, pp. 180—181, *ib.*

(b) A person who has a bad title or confesses that he has no interest whatever in the land, whether he be in possession or not, is not an "owner" within the meaning of sects. 76 and 77.

Illustrations.

(1) An agreement was made by D. and a railway company for the sale by the former of the fee simple of lands required for the company's undertaking. Instead of being able to make a sixty years' title, the vendor could show only a possessory title for thirty-six years:—*Held*, that D. could not compel the company to deposit the purchase-money in the bank under sect. 76, but the company might be ordered to go out of possession: *Douglass v. London and North-Western Ry.* (1857), 3 K. & J. 173. "It was argued that the Legislature may even have gone so far as to contemplate the case of a sale by a person having a positively bad title, and may have intended to provide that, even upon such a sale, the promoters of the company, not being satisfied with the title, should be at liberty to deposit the purchase-money to the credit of the vendors, of any other person whom they believe to be interested (describing them as far as they can do), and of all other persons who may have that title which the vendor has failed to show. But I think that cannot be the true construction of the section, for this reason: it is impossible to suppose that the Legislature could ever have contemplated that a person having a positively bad title, and who is merely in possession of land, should be at liberty, by his own agreement, to sell that land and to fix the price, adversely to another who may possibly be in a position to recover in ejectment the very next day": *per* Wood, V.-C., at p. 179, *ib.*

(2) W. and P. contracted to sell land to a local authority, but were not in possession of and failed to make out any title to a small strip of it. Thereupon the local authority paid the purchase-money of the whole into court and executed a deed poll under sect. 77 purporting to vest the whole of the land in themselves:—*Held*, that W. and P. were not "owners" of the strip of land within the meaning of sects. 76 and 77: hence, in the

circumstances, the local authority could not acquire the land under those sections; but specific performance was decreed as to the land, excepting the strip: *Wells v. Chelmsford Local Board* (1880), 15 Ch. D. 108. "It has been contended that the word 'owner' there includes a person like the plaintiffs, a person who confesses that he has no interest whatever in the land in question. If that were the true reading of the statute the effect would be very serious. For a person like the present plaintiffs admitting he has no claim or interest in the land, and not being in possession of the land (and in this case it is not shown that the plaintiffs were in possession), might nevertheless agree with the promoters of an undertaking to sell that land to the company, and upon payment of the purchase-money arranged between the stranger and the promoters into the bank, the true owner of the land might be deprived of his property": *per Fry, J.*, at p. 111, *ib.*

II. Procedure.

(a) Where there is a doubt as to the true ownership of the land, but the claimants are not absent or prevented from treating, the value of the land should not be determined by a surveyor under sects. 58 and 59 of the Lands Clauses Act, but by the verdict of a jury, or by an award under sect. 23, unless the promoters enter by agreement with the various claimants. When the wrong course has been adopted the compensation money which has been deposited will not be paid out till the value has been ascertained in the proper manner and paid into court.

Illustrations.

(1) The S. Waterworks Co. impounded a right of running water appurtenant to land held by J. in fee, subject to a chief rent to H. The compensation was agreed. H. claimed compensation. The company refused to pay the compensation to J. until he obtained the concurrence of H. in the conveyance. J. brought an action for the compensation, and the company filed a bill for specific performance of J.'s agreement and for an injunction restraining him from going on with his action:—*Held*, that on the company bringing the money into court, the injunction should be granted until the hearing of the cause: *Stockport District Waterworks v. Jowett* (1865), 13 W. R. 977.

(2) A railway company having given notice to treat as to, and being desirous of taking possession of, certain land vested in trustees for charitable purposes, caused the interest of the trustees to be valued by a surveyor, paid into court the sum so ascertained, and gave the bond required by sect. 85 of the Lands Clauses Act. Afterwards M., as lord of the manor, claimed an interest in the land taken. The company requiring another part of the charity lands, accordingly served notice to treat as to the whole upon M. as well as upon the trustees, had the interest of both claimants valued afresh, paid the amount thus determined into court, and gave another bond under sect. 85. Afterwards the company, owing to doubts as to the true ownership, applied to two justices to appoint a surveyor under sect. 59 (*ante*), deposited in the bank the sum thus ascertained, and executed a deed poll under sects. 75 and 76. A petition was thereafter presented by the company for payment out of the two sums first deposited, but this was dismissed, on the ground that the provisions of the Act had not been complied with, the compensation payable not having been ascertained by the verdict of a jury or by an award, and until this was done an order for payment out could not be made: *Ex parte London and South-Western Ry.* (1869), 38 L. J. Ch. 527.

(3) The G. E. Railway Co. served notice to treat on R. with respect to land claimed by him as waste of his manor. The compensation was assessed by arbitration, but as the

Crown claimed the land as part of the foreshore, the company paid the money into court. The Crown proceeded against R. by way of information. R. petitioned to have the money paid out to him :—*Held*, that as the Crown cannot by any process under the Lands Clauses Act be brought into court as a litigant to contest the claim, the petition must stand over until after the hearing of the information : *In re Lowestoft (Manor of)*, *Ex parte Reeve* (1883), 24 Ch. D. 253.

(b) Where the machinery of the Act for ascertaining the amount payable by the promoters for the land is not resorted to, and the promoters enter into an agreement of purchase with the party in possession, and on finding that he can show no title to the land pay the agreed purchase-money into court and execute a deed poll under sect. 77, the effect of the deed poll is only to vest in the promoters the actual interest of the party with whom the contract was entered into and to whom the money in court might be paid out if his possession would have ripened into a title by adverse possession but for the dealings with the company. The real owner in such circumstances is left to his remedy by ejectment.

Illustrations.

(1) H. entered into possession of a piece of land belonging to W. and remained in possession for nineteen and a half years. A railway company agreed to purchase the land from H., but on finding that he could not make a title they paid the purchase-money into court to the account of "the person interested" and executed a deed poll. W. made no claim to the land or the money until after the expiration of twenty years from the date when H. took possession :—*Held* that, as all the company acquired by this proceeding was the interest of H., H. was entitled as against W. to have the money paid out to him : *Ex parte Winder* (1877), 6 Ch. D. 696. "... As none of the machinery of the Act for ascertaining the amount either by surveyors or (if it could be done in such a state of things) by means of a jury, was resorted to in this case, it would rather seem that the effect of the deed poll would only be to vest the actual interest of the party with whom the contract was entered into. Under these circumstances, it left the real owner, as it seems to me, at liberty to take proceedings by ejectment or action against the company for having taken his property without having gone through the forms of the Act of Parliament. It is clear that he did not adopt the transaction of paying in for his benefit within twenty years, because, if there was a person really in existence at that time who could have made a claim, no claim was made" : *per* Hall, V.-C., at p. 705, *ib.*

NOTE.—This case and the similar case of *In re Evans*, 42 L. J. Ch. 357, where a person had been in adverse possession for eighteen years, were decided on the footing that such possession is a possession within sect. 79 of the Lands Clauses Act. In *Gedye v. Public Works Commissioners*, [1891] 2 Ch. 630, there was no such possession, the claim being made by a lessee, whose term had expired; to the value of the freehold reversion expectant on the determination of the lease; but the claimant had never in any sense entered into possession of the reversion as reversioner.

(c) When the amount awarded has been paid into court under this section there is no machinery in the Act to determine the relative value of the interests of different claimants, but the Court will use its own machinery to ascertain the value, and will direct payment accordingly.

Illustrations.

(1) A dean and chapter, and their lessee for twenty-one years under covenant not to assign without leave, entered into a contract for the sale of part of the premises to a railway company at an aggregate price. Upon completion of the purchase, the purchase-money was paid into court. The Court declined, upon the petition of the lessee, to apportion the purchase-money, but by consent the money was ordered to be invested and the interest paid to the lessee for his term or until further order; and *held*, that the company was not entitled to costs and expenses upon the petition: *Ex parte Ward* (1848), 2 De G. & Sm. 4.

(2) "I think the Court is bound to deal with and decide the question whether the claimants have the right of perpetual renewal which they allege they have, and that whether the reversioner is or is not before the Court, just as in the case of a bill for specific performance by a vendor against a purchaser, the Court would be bound to determine the question whether the vendor was entitled to the interest which he purported to sell, although the parties interested in disputing this right were not before the Court. If then the Court determined that there was no right of perpetual renewal, then, there being money in court representing the value of the lease with a right of perpetual renewal, and the lessee having only a lease without that right, what is next to be done? I think the Court would have no power to send it to a jury or arbitrator to assess the value except by consent of the parties; and that it would have no resource but to apply its own machinery to ascertain the value of that interest which it had determined to belong to the claimant and then pay that value to him and return the rest of the money to the party who paid it into court": *per Kindersley, V.-C.*, in *Brandon v. Brandon* (1864), 2 Dr. & Sm. 305.

(d) The company must, before paying money into court, call on the owner to make out a title.

Illustration.

Where a special Act provided that if the owner of lands, upon tender of the purchase-money or compensation agreed on or awarded, should refuse to accept it, or if he should refuse to make out a good title, or if he should be abroad or not to be found, the company might deposit the purchase-money or compensation in the Bank of England, whereupon all interest in such lands should vest in the company:—*Held*, that this clause was prospective, and the company could not pay the money into court without first calling upon the owner to make out a title: *Doe d. Hutchinson v. Manchester, Bury and Rossendale Ry.* (1845), 15 L. J. Ex. 208.

(e) A vendor not making out a title cannot compel the promoters, even if in possession, to pay the purchase-money into court, but they may be compelled to give up possession.

Illustration.

See *Douglass v. London and North-Western Ry.* (1857), 3 K. & J. 173, *ante*, p. 457.

Upon Deposit
being made a
receipt to be
given, and the
Lands to vest
upon a Deed Poll
being executed.

77. Upon any such Deposit of Money as last aforesaid being made the Cashier of the Bank shall give to the Promoters of the Undertaking, or to the Party paying in such Money by their Direction, a Receipt for such Money, specifying therein for what and for whose Use (described as aforesaid) the same shall have been received, and in respect of what

Purchase the same shall have been paid in ; and it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll under their Common Seal if they be a Corporation, or if they be not a Corporation under the Hands and Seals of the said Promoters, or any Two of them, containing a Description of the Lands in respect whereof such Deposit shall have been made, and declaring the Circumstances under which and the Names of the Parties to whose Credit such Deposit shall have been made, and such Deed Poll shall be stamped with the Stamp Duty which would have been payable upon a Conveyance to the Promoters of the Undertaking of the Lands described therein ; and thereupon all the Estate and Interest in such Lands of the Parties for whose Use and in respect whereof such Purchase Money or Compensation shall have been deposited shall vest absolutely in the Promoters of the Undertaking, and as against such Parties they shall be entitled to immediate possession of such Lands.

Effect of executing the deed poll provided for in the section.

The effect of executing the deed poll is to vest in the company or promoters, as the case may be, the actual interest of the party with whom the contract was made.

Illustration.

See *Ex parte Winder* (1877), 6 Ch. D. 696, sect. 76, *ante*, p. 459 ; and *Wells v. Chelmsford Local Board of Health* (1880), 15 Ch. D. 108, *ante*, p. 458.

Application of
Monies so
deposited.

78. Upon the Application by Petition of any Party making claim to the Money so deposited as last aforesaid, or any Part thereof, or to the Lands in respect whereof the same shall have been so deposited, or any Part of such Lands, or any Interest in the same, the said Court of Chancery in England or the Court of Exchequer in Ireland, may, in a summary Way, as to such Court shall seem fit, order such Money to be laid out or invested in the Public Funds, or may order Distribution thereof, or Payment of the Dividends thereof, according to the

respective Estates, Titles, or Interests of the Parties making claim to such Money or Lands, or any Part thereof, and may make such other Order in the Premises as to such Court shall seem fit.

NOTE 1.—The words in italics were repealed by the Statute Law Revision Act, 1892.

NOTE 2.—This section was extended to the Land Commission, Ireland, by the Irish Land Act, 1903 (3 Edw. VII. c. 37), s. 24 (11).

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I. Conversion.

(a) The words "so deposited as last aforesaid" refer to sect. 76, and money paid in thereunder is treated as converted into personalty, and there is no constructive reconversion as in the case of money paid in under sect. 69. Thus a fund in court representing compensation money ascertained under the provisions of the Act, or by agreement before the death of the owner of the land, passes to his executors as personal estate.

Illustrations.

(1) Under a local Act the Common Council of London gave notice of intention to take a freehold house belonging to H. The purchase-money was agreed upon and an abstract of title delivered. H. then died, having by his will devised his real estate to one person and his residuary personal estate to another. It was *held* that the purchase-money formed part of the personal estate : *Ex parte Hawkins* (1843), 13 Sim. 569.

NOTE.—This case proceeded on the ground of special contract ; "for the price had been fixed by the surveyors of the parties, and the landowner had sent in an abstract of his title" (see *Watts v. Watts* (1874), L.R. 17 Eq. 217 ; distinguishing *Haynes v. Haynes* (1861), 1 Dr. & Sm. 217).

(2) Money was paid into court under the Lands Clauses Act for land taken from a person who was in a state of mental imbecility, and who so continued till his death, but

without having been the subject of a commission in lunacy. His executors were *held* entitled to the money : *Ex parte Flamank* (1851), 1 Sim. (N.S.) 260.

NOTE.—This case was dissented from in *In re Tugwell* (1884), 27 Ch. D. 309, where, however, the purchase-money had been ascertained and paid into court under a special Act which did not incorporate the compulsory clauses of the Lands Clauses Consolidation Act. The decision went on the ground that sect. 7 of the Lands Clauses Act does not enable a person of unsound mind to sell (*see* now sects. 116 and 120 of the Lunacy Act, 1890).

(b) If there is no actual or constructive conversion during the life of the owner of the land, the money retains the character of real estate.

Illustrations.

(1) W. had land within the limits of deviation laid down for the construction of a railway. The railway company agreed with W. that, in case they should construct the railway, they should pay W. for such of his land as they should take at the rate of 500% per acre. W. died, having by his will devised the land comprised in the contract ; and the company subsequently took five acres of the land and paid the purchase-money into court. It was *held* that the money formed a portion of W.'s real estate at the time of his death, and continued to retain that character afterwards ; and that the devisees of the land were entitled to the money : *In re Walker's Estate* (1853), 22 L. J. Ch. 888.

(2) Under local Acts purchase-money was paid into court which represented land to a share of which B. was entitled. B. was sentenced to seven years' transportation for felony. After the seven years he applied for payment of his share of the money. It was *held* that he was entitled, as the money must be considered as land and not forfeited to the Crown for the felony : *In re Harrop's Estate* (1857), 3 Dr. 726.

NOTE.—In this case a jury had been summoned to return the amount of the purchase-money. Vice-Chancellor Kindersley said : " When the circumstances of the case have brought it under the 69th section of the Lands Clauses Act, the money has been held to bear the character of realty ; but if, on the other hand, the circumstances have brought the case under the 78th section then the money has been held personalty."

(3) B. was under his marriage settlement tenant for life of land and, subject to intervening interests, the ultimate owner in fee simple. By his will he devised the land specifically, and the will contained no general devise. After the date of the will he contracted to sell part of the land to a railway company, but no conveyance was executed. The company paid interest on the purchase-money to B. ; and upon his death and the failure of the intervening interests, they paid the purchase-money into court. It was *held* that, there being no general devise, the money descended as real estate to the heir of B. : *In re Bagot's Settlement* (1862), 31 L. J. Ch. 772.

II. Any party making claim.

(a) Mortgagees, legal or equitable, of the land taken are entitled to apply under this section, but only six years' arrears of interest will be allowed out of the fund.

Illustrations.

(1) A railway company, under their compulsory powers, took land subject to two mortgages, which extended over other lands as well as the land taken. The purchase-money was paid into court, and the company took an assignment of the two mortgages

and petitioned for payment out to themselves of the purchase-money. The order was made, Turner, L.J., saying that sect. 78 left a discretion in the Court as to the mode in which the money should be dealt with, and he considered that in all such cases where the circumstances would admit, the Court will give effect to the rights of the parties: *Re Marriage, Ex parte London, Tilbury and Southend Ry.* (1861), 9 W. R. 843, 844.

(2) Money was paid into court by the Corporation of Leeds in respect of a public-house taken by them under compulsory powers. The house was subject to an equitable mortgage by deposit, with a memorandum undertaking to give a legal mortgage. No interest had ever been paid upon the mortgage debt, and the full amount of principal and interest remained due since the date of the advance. The mortgagees petitioned for payment out of the full amount due; but they were *held* entitled to the principal sum and six years' arrears of interest only: *In re Stead's Mortgaged Estates* (1876), 2 Ch. D. 713.

(3) Business premises which had been mortgaged with the machinery and fixtures were taken by a railway company, but before the price was fixed the mortgagees entered into possession. An umpire awarded 11,950*l.* as compensation, of which 2,800*l.* were awarded in respect of the loss of profits in carrying on the business. The mortgagor being dead, his executors claimed the 2,800*l.*; but it was *held* that this sum was in the nature of compensation for the value of the goodwill of the business and belonged to the mortgagees: *Pile v. Pile, Ex parte Lambton* (1876), 3 Ch. D. 36.

(b) If part of the money paid into court belongs to the claimant independently of title to the land, *e.g.*, compensation in respect of trade damage and personal expenses, that part will be paid out, but an inquiry may be ordered as to title with respect to the remainder (see *ante*, p. 294).

Illustration.

The M. Board of Works, acting under statutory powers, gave C. notice to take his leasehold house. They offered and he agreed to accept 400*l.*, 150*l.* of this being for his leasehold interest, and 250*l.* for trade damage and personal expenses. C. had mortgaged his leasehold interest and could not make a good title. C. then brought an action for specific performance of the agreement, and the defendants paid the 400*l.* into court under sect. 76, executed a deed poll, and took possession. An inquiry was directed as to the title and liberty given to apply in chambers for the payment of the purchase-money, the 250*l.* with interest from the date when C. gave up possession of the land being ordered to be paid to C. at once: *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472, 480.

(c) If the title has been found satisfactory under a decree, the money will be ordered to be paid out to the claimant.

Illustration.

The M. Railway Co. served notice to treat on G. The compensation was assessed by arbitration. An abstract of title, to which the company took no objection, was furnished, and the company took possession, but did not pay the compensation. G. filed a bill, and a decree was made for payment by a certain day, interest from date of possession and costs, and declaring that G. was entitled to a lien enforceable by sale. The day before that fixed for payment the company gave notice that they intended to pay the money into court, as they alleged the title only extended to part of the property. The company paid the money into Court to an account entitled "*Ex parte* the M. Railway Co. : The account of G. in respect of premises, &c." The company afterwards paid a sum

for interest to G., which he alleged to be insufficient. G. petitioned for payment out :—*Held*, that sect. 78 of the Lands Clauses Act gave the Court power to order the money to be paid out : *Galliers v. Metropolitan Ry.* (1871), L. R. 11 Eq. 410.

III. Distribution and apportionment of fund in court.

(a) If one of certain classes of persons, to whose account money has been paid into court, applies, the Court may deal with the fund.

Illustration.

“Here is money in court to the account of A., B. and C., that is, to the account of certain classes of persons, and one of those persons comes and says, ‘Deal with that money.’ Then the Court, I understand, is bound to deal with the question. The claimants have a right to have it dealt with ; and the Court, though it might not have before it the reversioner to contest the question, would be bound, as in a case between vendor and purchaser, in the absence of a person interested, to determine whether the vendor had such an interest as he purported to sell . . . and if it determined that there was not the right of perpetual renewal, then, there being money in court representing a lease with a right of perpetual renewal, and the claimant having a lease without such a right, *quoad* a certain portion of the property, I think the Court would have no resource but to apply its own machinery to find out the value of the interest which did belong to the claimant, to give that to him, and the rest of the money to the party who had paid it in” : *per* Kindersley, V.-C., in *Brandon v. Brandon* (1864), 34 L. J. Ch. at p. 336.

(b) If money is paid into court for an interest beyond that to which the claimant is entitled the Court will apportion the fund.

Illustrations.

(1) The S. Staffordshire Railway took possession of certain freehold and copyhold land at W. and paid into court the sum of 940*l.* as the estimated value thereof. An agreement was made with the tenant for life for the purchase of the fee simple ; but, upon investigation of the title, part of the land was found to be copyhold, with a defective title as to an undivided moiety. The Court ordered the money to be apportioned, so as to carry over the amount representing the price of that part of the land to which a good title had been made, to a separate account and the dividends paid to the tenant for life, but the capital not to be paid out without notice to the company : *In re Perkes* (1853), 1 Sm. & G. 545.

(2) Money was paid into court by the E. C. Railway in respect of a foreshore belonging to the petitioners, who discovered that a small portion of the land taken by the company and included in the reference to arbitration did not, in fact, belong to them. The Court directed the money in court to be apportioned under sect. 78 : *In re Alston's Estate* (1857), 5 W. R. 189.

(3) The N. London Railway required certain premises in the occupation of C. and gave him notice to treat in respect thereof. C. claimed compensation in respect of two leases, for twenty-one years and eighty years respectively, and also for loss of business : 1,500*l.* was awarded for the leases and 700*l.* for loss of business, which sums the company paid into court. It turned out that the leases were void, having been granted by the executor instead of the heir of a last surviving trustee :—*Held*, that C. was entitled to such part of the 1,500*l.* as represented the value of certain improvements carried out by him on the faith of the leases being valid, and that the balance of the money in court must be

refunded to the company: *Ex parte Cooper, In re North London Ry.* (1865), 34 L. J. Ch. 373.

NOTE.—An agreement by counsel will not be accepted as determining the value of the interest.

Illustration to Note.

When the value of the interest claimed was agreed by counsel at 600*l.*:—*Held*, that this did not determine the rights of the parties, and an order like that in *Ex parte Cooper, In re North London Ry. (ante)*, was made: *In re Hayne* (1865), 13 W. R. 492.

(c) When money has been paid into court in respect of lands, the title to which is the subject of dispute, the respective interests of the persons claiming may be adjusted by the Court upon the application of those claiming an interest.

Illustrations.

(1) A railway company having agreed to purchase certain leasehold premises from the petitioners, the under-lessees disputed their right to sell without taking a legal surrender, and claimed, at all events, an equitable apportionment of the value of the lease. The Court was of opinion that, under the 45th section of the company's Act, the whole interest in the premises vested in the company, notwithstanding the defective surrender; but an issue was directed to determine the question whether, when the contract was made, the under-lessee had any interest in the premises, and, if so, what was the proportionate value of the interest: *Ex parte Issauchaud* (1839), 3 Y. & C. 721.

(2) The M. Railway gave B. notice to treat for a leasehold which B. claimed to have a right to renew, which was disputed by the lessor. The company agreed to pay the value of the unexpired term of the original lease, with a proviso that if B. substantiated the right to renewal the company would pay a further sum to be settled, if in dispute, by arbitration. The company took possession and purchased the reversion in fee. B. filed a bill praying a declaration that she was entitled to renew the lease and that the company should pay compensation for the longer term:—*Held* that, as the company had put themselves in the position of the parties as against whom the right had to be substantiated, the machinery of the Lands Clauses Act was inapplicable, and that the Court would deal with the question, although the period for the exercise of the right of renewal has not yet arrived: *Bogg v. Midland Ry.* (1867), L. R. 4 Eq. 310. "It is said that the Court will not entertain a bill seeking merely a declaration of future rights. But the company cannot be allowed to take a man's property from him until the value of his interest has been ascertained; and if no special machinery under the Lands Clauses Act exists for that purpose, the Court will deal with and decide that question": *Brandon v. Brandon* (1864), 2 Dr. & Sm. 305; *Ex parte Cooper, In re North London Ry.* (1865), 2 Dr. & Sm. 312. "The company have, under the agreement which they have entered into, agreed that, in the event of the plaintiff substantiating her right to a renewal, they will pay an additional sum, the amount to be settled by arbitration under the Lands Clauses Act. How is the plaintiff to substantiate her claim without coming here? There is no other course open to her. She cannot come at the end of the fourteen years, when the company is in possession of the property and the line has been constructed, and then ask for a renewal. The land has been taken out and out and she wants to be paid out and out. Under these circumstances I think I am in a position to determine what the right of the plaintiff is, notwithstanding the period for the exercise of it has not yet arrived": *per* Lord Hatherley at p. 314, *ib.*

(3) Land belonging to H., an infant, subject to his mother's right of dower, was taken by the M. Railway, and the purchase-money, as determined by two valuers, paid

into court:—*Held*, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the *corpus* of the fund in court: *In re Hall's Estate* (1870), L. R. 9 Eq. 179.

(4) B., who was the occupier of land under a building agreement determinable if the buildings were not completed by November 30th, 1885, was informed in 1880 that a bill was being promoted for a railway which would affect the land. B. saw his landlord's agent thereupon, who told him not to go on with building operations until the result of the railway scheme became known. No express agreement was made between them as to extension of time for building. In 1883 the railway company obtained their Act, and on July 31st, 1883, purchased from the landlord the part of the land required by them, the purchase being expressly made subject to the building agreement. On September 16th, 1884, the company gave B. notice to treat. B. sent in no claim, and in January, 1886, the company took possession without making a deposit or giving a bond, as required by the Lands Clauses Act, insisting that B. had no interest in the land:—*Held*, on an application by B. for an injunction and a declaration that the building agreement was subsisting, and that he was entitled to have his interests assessed on that footing, that, notwithstanding the expiration of the term named in the agreement, B. had an interest in the land, and that the railway company's rights were subject to that interest: *Birmingham Land Co. v. London and North-Western Ry.* (1888), 40 Ch. D. 268.

(d) Where the Crown is concerned, the petition will be ordered to stand over until any information that may have been filed on behalf of the Crown has been heard.

Illustration.

Where the Crown filed an information against R., the lord of the manor, part of whose waste had been taken by a railway company, the Crown claiming the land as part of the foreshore:—*Held*, that the petition by R. for payment out of the fund in court ought to stand over until the information had been heard: *Ex parte Reece, In re Lowestoft Manor* (1883), 24 Ch. D. 253.

IV. Applications under this section are now generally made by summons, and not by petition, having regard to R. S. C. Ord. LV. rule 2 (7).

Money in court, which is liable to be dealt with under this section, is cash under the control or subject to the order of the Court, and may therefore be invested in any of the stocks, funds, or securities specified in R. S. C. Ord. XXII. rule 17 (and see *Ex parte St. John's College, Oxford*, 22 Ch. D. 93). It was *held* in *In re Gaselee*, [1901] 1 Ch. 923, that, on an interim investment of money paid into court under this Act in any of the securities sanctioned by the Court, the costs payable by the promoters include the increased cost of brokerage and other charges occasioned by an investment in railway stock.

79. If any Question arise respecting the Title to the Lands in respect whereof such Monies shall have been so paid or deposited as afore-

Party in possession to be deemed the Owner.

said, the Parties respectively in possession of such Lands, as

being the Owners thereof, or in receipt of the Rents of such Lands, as being entitled thereto at the Time of such Lands being purchased or taken, shall be deemed to have been lawfully entitled to such Lands, until the contrary be shown to the satisfaction of the Court; and unless the contrary be shown as aforesaid, the Parties so in possession, and all Parties claiming under them, or consistently with their Possession, shall be deemed entitled to the Money so deposited, and to the Dividends or Interest of the Annuities or Securities purchased therewith, and the same shall be paid and applied accordingly.

NOTE.—This section was extended to the Land Commission, Ireland, by the Irish Land Act, 1903 (3 Edw. VII. c. 37), s. 24 (11).

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I. Object of the section.

Sect. 79 contains a direction to the Court how to proceed when it has been found impossible to decide who was lawfully entitled to the land sold.

Illustration.

Land forming part of Sunderland Town Moor was taken by a railway company and the purchase-money paid into court. Difficulties having arisen, an issue was directed, and the jury found that neither party to the issue had made out a title to the land taken by the company. At the trial of the issue the judge did not tell the jury that, by sect. 79 of the Lands Clauses Act, the freemen and stallingers being in possession as owners ought to be deemed the owners, unless they were satisfied that the Bishop of Durham had made out his title:—*Held*, by Kindersley, V.-C., that this was no misdirection, for sect. 79 is intended only as a direction to the Chancery Court how it should act in any case in which, upon an application for the money paid in or deposited by the railway company, it should be unable to arrive at a satisfactory conclusion as to what party was lawfully entitled to the land: *Ex parte Sunderland Freemen and Stallingers* (1852), 1 Drew. 184.

II. A person in occupation of land, and who has acquired a possessory title thereto under the Statute of Limitations, comes within the section.

NOTE.—From the first day of January, 1879, sect. 1 of the Real Property Limitation Act, 1874 (which fixes the period of limitation for the recovery of land or rent at twelve years), was substituted for sect. 2 of the Real Property Limitation Act, 1833. See sect. 9 of the Act of 1874.

Illustrations.

(1) W., J. and D. A. claimed to be entitled to certain lands and a foreshore known as Chalkwell Ouze, over which they had exercised the rights of ownership for more than twenty years. This was consistent with the documentary evidence, but no grant from the Crown could be found:—*Held*, that they were entitled to the purchase-money paid for the land: *In re Alston's Estate* (1857), 5 W. R. 189. "There had been acts of ownership submitted to by the Crown for twenty-two years and upwards, all consistent with the documentary evidence. Looking at the Lands Clauses Act, he should not feel justified in sending the matter to a jury, having himself no doubt upon the point. The petitioners were strictly in possession, and must be taken to be within sect. 79": *per* Wood, V.-C. at p. 191, *ib*.

(2) The Witney Railway agreed with C. to purchase of him certain land, and paid the purchase-money into court under sect. 69 of the Lands Clauses Act. It afterwards transpired that C.'s title was derived under an indenture of mortgage, dated in 1814, and that the mortgagees had been in possession for about twenty years. C. petitioned for investment of the purchase-money and payment of the dividends, and this the Court directed: *In re Cook* (1863), 8 L. T. 759.

(3) W. took possession of a piece of land in Shoreditch which had been vacant for ten years before. He cleared the ground, built two workshops upon it, and remained in possession for twenty-nine years. The property being taken under compulsory powers:—*Held*, that W. was entitled to have the purchase-money paid out to him: *Ex parte Webster* [1866] W. N. 246.

(4) In 1871 the Court was petitioned by H. for payment out of purchase-money (600*l.*) to him as being the person entitled to the land in respect of which the purchase-money had been paid into court. It was *held* then by Stuart, V.-C., that the possession must be that of persons who were in possession "as being the owners thereof, or in receipt of the rents of such lands as being entitled thereto at the time of such lands being purchased or taken. . . ." The bare possession of H., as it had not been retained until the end of twenty years, but had been interrupted by the Parliamentary rights of the company before his title had ripened, was merely an inchoate title, and hence H. was not entitled to the purchase-money: *Ex parte Hollingsworth* (1871), 19 W. R. 580; see *Ex parte Winder*, *post*, where the facts are stated.

(5) E. claimed as owner to be entitled to the purchase-money of land taken. E.'s husband had been in possession in 1849, when an adverse claim had been made to the land, but a compromise took place, although no conveyance had been executed. Upon the husband's death in September, 1850, E. entered into possession, and since that date until the railway company took the lands there had been no adverse claim. The husband's heirs disclaimed all right to the land:—*Held*, that the fund ought to be paid out to E., as her possession would have ripened into a title by adverse possession but for the land being required by the railway company: *In re Evans* (1873), 42 L. J. Ch. 357; distinguished in *Gedye v. Public Works Commissioners*, *post*.

(6) H. entered into possession of land belonging to W. and remained in possession for nineteen and a half years. A railway company agreed to purchase the land from H., but on finding that he could not make a title, they paid the purchase-money into court to the account of "the person interested," and executed a deed poll. W. made no claim to the land or the money until after the expiration of twenty years from the date when H. took possession:—*Held* that, as all the company acquired by this proceeding was the interest of H., H. was entitled as against W. to have the money paid out to him: *Ex parte Winder* (1877), 6 Ch. D. 696; distinguished in *Gedye v. Public Works Commissioners*, *post*.

(7) In 1878 certain house property, of which C. was the ostensible owner in fee, was taken by a board of works under statutory powers. The property had been purchased in 1875 as freehold, but it was discovered, on investigating the title, that G., the vendor to C. in 1875, had only a leasehold interest, which expired on March 25th, 1854. The board thereupon required proof that, as the vendor's (C.'s) title depended upon adverse possession since 1854, the owner of the reversion expectant upon the expiration of the term was not under any disability. C. could not tell who was entitled to the reversion :—*Held*, that C. was entitled to rely upon sects. 76 and 79 of the Lands Clauses Act as enabling him to give a good title : *Ex parte Chamberlain* (1880), 14 Ch. D. 323.

NOTE.—With regard to this case, Bowen, L.J., said, in *Gedye v. Public Works Commissioners*, *post* :—“ I very greatly doubt if that decision is right. I greatly doubt whether it was not shown there that the man was not in occupation as owner within the meaning of the statute.”

(8) A house was purchased by N. G. in 1856, and assigned to him by a deed dated May 6th, 1856. At the time of his purchase it was stated to him that the vendor's title was derived under a long term of years, the beginning of which was unknown, but that in an old deed there was a recital that at Michaelmas, 1771, the term still had 107 years to run, so that it would expire at Michaelmas, 1878. No rent had been paid for the house by N. G.'s predecessors in title for many years, and no rent was paid after he acquired the house. It was not known who the reversioner (if any) was. In 1866 the house was taken under statutory powers; the value of the house was ascertained; and in 1869 the value of the leasehold interest was paid to the tenant, and a sum representing the value of the reversion was paid into court. In 1890, twelve years after the term had expired, no claim having been made in the interval to the value of the reversion, the tenant applied that the fund in court might be paid out to him, as the person who was in possession of the house at the time when it was taken :—*Held*, that as N. G. was in possession as leaseholder only, and the leasehold interest had been sold before it expired and the purchaser had come into possession, he had no claim on the money appropriated to the value of the fee : *Gedye v. Public Works Commissioners*, [1891] 2 Ch. 630. “ When this money was paid this gentleman was not in possession of the land as owner thereof; but was in possession of the land and profits as termor ” : *per* Lindley, L.J., at p. 638, *ib*.

(9) By lease dated in 1851, T. and others demised certain premises to F. for twenty-five and a half years from June 1st, 1851, at a rent of 50*l*. F. died in 1865, having bequeathed his leasehold interest to A., after the death of M., upon certain conditions. From F.'s death until the expiration of the lease A. was in possession by himself or his sub-tenants, and paid the rent. He continued to pay rent to the survivor of the lessors till 1878, when her interest expired. From April, 1878, A. remained in undisturbed possession and in receipt of the rents, but never paid any rent. M. died in 1879, and A. complied with the conditions in F.'s will. The property was taken under statutory powers, and the purchase-money paid into court, being claimed by A. and also by W. It was *held* that the money ought to be paid out to A., after advertisements, W. having been served, but not appearing : *In re Blackrock Town Commissioners, Ex parte Forde*, [1894] 1 Ir. R. 156.

(10) In 1810 a freehold house was demised, at a peppercorn rent, for 200 years to secure an annuity of 100*l*., payable until the death of the survivor of nine named persons, upon which event the term was to cease. From 1829 to 1895, when the ninth life dropped, and from 1895 to December, 1900, the annuitant or his successors in title, the last of whom was the petitioner, had been in possession of the premises and in receipt of the whole of the net rent, which was never less than 120*l*. per annum, without any claim by the reversioner, who was wholly unknown. In December, 1900, the premises were taken under the provisions of the Lands Clauses Act and the purchase-money paid into court. On petition for payment out under sect. 79 of that Act, Joyce, J., gave the

following direction :—"I cannot in the circumstances order the *corpus* of the fund to be paid out to the petitioner, but I shall make an order directing the investment of the fund in court and payment of the dividends on such investment to the petitioner until the expiration of twelve years from the dropping of the last of the nine lives—that is from May 31st, 1895—or until further order. Costs according to the Act" : *In re Harris Ex parte London County Council* (1901), 70 L. J. Ch. 432.

NOTE.—In the case of closed burial grounds, see the two following cases.

Illustrations to Note.

(1) The fee simple of a burial ground, since closed by Order in Council, was vested in the vicar and churchwardens of the parish, and the burial fees were directed to be received by the churchwardens, and by them handed over to a body called the church trustees. A portion of the burial ground having been required by a railway company for the purposes of their Act, and the purchase-money having been directed to be invested and accumulated the question was who was entitled to the fund and its accumulations :—*Held*, that the church trustees were entitled : *In re St. Pancras Burial Ground* (1866), L. R. 3 Eq. 173.

(2) In 1704 a church was built on land set apart and provided by the Corporation of L., in pursuance of an Act of William III., and a churchyard was inclosed on the land. By the sentence of consecration the corporation renounced all right and title to the churchyard, which was used as a burial ground until it was closed in 1854 by Order in Council. In 1866 the corporation served notice to treat on C., the rector of the church, in respect of part of the churchyard ; C. made a claim, and compensation was assessed by arbitration. The corporation refused to pay, alleging that, on the making of the Order in Council closing the churchyard for burials, the land had reverted to them :—*Held*, that the Act of Parliament, followed by the act of consecration, for ever excluded the corporation from any right in the land, and that there was no right of reverter : *Campbell v. Liverpool Corporation* (1870), L. R. 9 Eq. 579.

III. The claimant is not, it seems, to be put to adverse proof of his title.

Illustrations.

(1) By a railway Act it was provided that in case any question should arise as to the title of the lands to be taken or used for the purposes of the Act, the party in possession at the time of the purchase should be deemed to be lawfully entitled, until the contrary should be shown to the satisfaction of the Court ; and it was further enacted that in case the proprietor or other person interested in the land and entitled to receive the purchase-money should be unable to make a good title to the land, it should be lawful for the company to pay the money into court to the credit of the person interested, subject to the disposition of the Court, and thereupon the company's title should be deemed complete. Under this Act, the company having contracted to purchase a piece of land of the party in possession, and having entered into possession under the contract, objected to the title, and paid the money into court to the credit of the person with whom they had so contracted :—*Held* that such person, upon his own affidavit of title, was entitled to receive payment of the money out of court to his own absolute use : *Ex parte Grainge, In re Great Western Ry.* (1838), 3 Y. & C. 62.

(2) A small part of a settled estate was taken by a railway company and the purchase-money paid into court, upon the ground that an old will, the root of the title, admitted of various constructions and adverse claims might be raised :—*Held*, upon a petition by the tenant for life for investment of the money in court and payment of the dividends to him, that the petition ought to be granted : *In re Perry's, or Sterry's, Estate* (1855), 1 Jur. (N.S.) 917. "I am not called upon by sect. 79, or any other section in the Act, to

determine now any of these difficult points which have been raised. I am not bound to form any opinion on the effect of the limitations. The statute clearly intended only that the person in possession should not be disturbed in his enjoyment of the land, or its equivalent, unless the contrary of his title be clearly made out to the satisfaction of the Court. It never was the intention of the Legislature that a man should be put to defend the whole of his property, because a small portion of it has been taken by a railway company. The petitioner is to have possession until she is dispossessed. It is quite proper, however, in the railway company to state the difficulty to the Court. The position of the company is somewhat analogous to that of a trustee who has paid the trust fund into court; he is bound to see the whole case brought forward, but not to argue any point in it:" *per Wood*, V.-C., at p. 917, *ib.*

Costs in Cases of
Money deposited.

80. In all Cases of Monies deposited in the Bank under the Provisions of this or the Special Act, or an Act incorporated therewith, except where such Monies shall have been so deposited by reason of the wilful Refusal of any Party entitled thereto to receive the same, or to convey or release the Lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any Party to make out a good Title to the Land required, it shall be lawful for the Court of Chancery in *England* or the Court of *Exchequer* in *Ireland* to order the Costs of the following Matters, including therein all reasonable Charges and Expenses incident thereto, to be paid by the Promoters of the Undertaking; (that is to say,) the Costs of the Purchase or taking of the Lands, or which shall have been incurred in consequence thereof, other than such Costs as are herein otherwise provided for, and the Costs of the Investment of such Monies in Government or Real Securities, and of the Reinvestment thereof in the Purchase of other Lands, and also the Costs of obtaining the proper Orders for any of the Purposes aforesaid, and of the Orders for the Payment of the Dividends and Interest of the Securities upon which such Monies shall be invested, and for the Payment out of Court of the Principal of such Monies, or of the Securities whereon the same shall be invested, and of all Proceedings relating thereto, except such as are occasioned by Litigation between adverse Claimants: Provided always, that the Costs of One Application only for Reinvestment in Land shall be allowed, unless it shall appear to the Court of Chancery in *England* or the Court of *Exchequer* in *Ireland* that it is for the Benefit of the Parties interested in the said Monies

that the same should be invested in the Purchase of Lands, in different Sums and at different Times, in which Case it shall be lawful for the Court, if it think fit, to order the Costs of any such Investments to be paid by the Promoters of the Undertaking.

NOTE.—The words in *italics* were repealed by the Statute Law Revision Act, 1892.

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I. Costs of reinvestment and payment out of court generally.

(a) No power to grant costs unless authorised by statute.

(i.) At the time of the passing of the Lands Clauses Act, and for long afterwards, a curious and very unjust anomaly existed in the law on this subject. It was well established that in proceedings taken under statutes no costs could be awarded except such as were authorised by the particular Act; and therefore where money was paid into court under an Act of Parliament containing no express provisions as to the costs of payment out, the Court had no jurisdiction to order the payment of such costs by the promoters. It followed that where the Lands Clauses Act was not incorporated with the special Act, or where the provisions of the special Act were inconsistent with those of sect. 80, no order could be made for the payment by the promoters of such costs unless such order was authorised by the special Act.

Illustrations.

(1) Where the words of the sections in a railway company's special Act relating to the payment into the Bank of England of purchase or compensation money made no

provision for the particular case of payment out of court :—*Held*, by Shadwell, V.-C., that the costs of a petition presented by the person entitled to the money were not payable by the company : *In re Bristol and Exeter Ry., Ex parte Gore Langton* (1847), 11 Jur. 686.

(2) The Commissioners of Woods and Forests, acting under an Act (3 & 4 Vict. c. 87, extended by 9 & 10 Vict. c. 34), took certain buildings belonging to three charities and paid the purchase-money into court. The Act of 1840 provided that when money had, by reason of disability, to be paid into court, it should be lawful for the Court to order the expenses of all purchases to be made in pursuance of the Act to be paid by the Commissioners :—*Held* that, the Lands Clauses Act being excluded by 9 & 10 Vict. c. 34 from being applied to 3 & 4 Vict. c. 87, the only order that could be made was that the petitioners' (trustees of one charity) costs be paid out of one-third of the fund and that the balance be paid out to them : *In re St. Dunstan's Charity Schools* (1871), L. R. 12 Eq. 537.

(3) Purchase-money had been paid into the Court of Chancery in 1835, under an Act of Parliament which provided that it should "be lawful for the Court to order the expenses of all purchases made with the fund in pursuance of this Act, together with the necessary costs and charges of obtaining such order," to be paid by the company lodging it :—*Held*, that the Court had no power to order the costs of drawing out the fund to be paid by the company : *In re Ulster Canal and Lord Primate* (1872), Ir. R. 6 Eq. 208. *See also*, for the history of the law on this point, *In re Fisher*, [1894] 1 Ch. 450, *post*.

- (ii.) The question whether the Court is authorised to grant costs under any particular Act must necessarily depend upon the interpretation of the Act in question, but the following decisions illustrate the construction placed upon a few special Acts as to the costs of investment of funds in court.

Illustrations.

(1) Where an Act of Parliament establishing a railway company directs that the money to be paid for lands to be purchased by the company shall be paid into the bank, until the same shall, upon petition, be applied in the purchase of other lands, and, in the meantime, until such purchase can be made, shall, upon application to the Court, be invested in the funds, and that the expenses and costs attending such purchase shall be paid by the company :—*Held* that, under the latter clause, a party applying to have the money invested in the funds is not entitled to have the costs of the application : *Ex parte Taylor, In re London and Birmingham Ry.* (1835), 1 Y. & C. 229.

(2) Where lands are purchased by commissioners under 2 & 3 Vict. c. 61 for the purposes of the Act, and the purchase-money is lodged in court, the Court will, under the words "reasonable costs, charges and expenses" in sect. 29, award to the persons entitled the costs of necessity incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject : *In re Shannon Commissioners* (1841), 3 Ir. Eq. R. 355.

(3) A., being tenant for life of an estate, with remainder to his sons successively in tail male, entered into an agreement with B. whereby it was stipulated that A. should procure an Act of Parliament to enable him to sell the estate to B., and that B. should bear all the expenses incident to and consequent upon his proposal to purchase the estate, together with the expense of obtaining the Act, of preparing the abstract, and showing a title to the estate, and of and about making and completing the sale and conveyance to him, together with the expense of the agreement, and all other expenses of A. in consequence of the sale or in anywise relating thereto or to the proposal of B. A. accordingly

obtained an Act for the sale of the estate to B., which directed the purchase-money to be invested in lands to be settled to the same uses as the estate stood limited to:—*Held*, that B. was not liable to pay the costs of the investment: *In re London Bridge Acts, Ex parte Clothworkers' Co.* (1842), 13 Sim. 176.

(4) The Act 57 Geo. III. c. xxix., known as Michael Angelo Taylor's Act, contains no express provision as to the costs of an interim investment in stock of compensation money paid into court under that Act:—*Held*, that the Court had no jurisdiction to order the costs of an application for such an interim investment to be borne by the parties who had paid the money into court: *Ex parte Crober* (1849), 13 Jur. 481. *See also* to same effect under other Acts, *Ex parte Hirst* (1841), 4 Y. & C. 468; and *In re Gould* (1857), 24 Beav. 442.

(5) Under the Union and Parish Property Act, 1835 (5 & 6 Will. IV. c. 69), which enables guardians to purchase, but not compulsorily, lands of persons under disability, and empowers the Court to order the cost of the "purchase, payment into court or application" [for reinvestment] to be paid by the guardians, but makes no further provision for payment of the expenses of the investigation of title on a reinvestment:—*Held*, that such expenses are payable by the guardians: *In re Byron's Settlement* (1853), 4 De G. M. & G. 694.

(b) Judicature Acts, 1875 and 1890.

It was thought at one time that the anomaly above referred to had been removed by the Judicature Act, 1875, and Ord. LV. of the Rules of Court framed under it, and this opinion found expression in the judgment of Jessel, M.R., in *Ex parte Mercers' Co.* (1879), 10 Ch. D. 481. A few years later, however, the Court of Appeal, in *In re Mills' Estate, Ex parte Commissioners of Works* (1886), 34 Ch. D. 24, decided that the Judicature Act, 1875, and Ord. LV. rule 1, merely altered the practice, and did not give the Court any increase of jurisdiction. The anomaly therefore remained, until the passing of the Judicature Act, 1890, of which sect. 5 runs as follows:—

"Subject to the Supreme Court of Judicature Acts and the Rules of Court made thereunder and to the express provisions of any statute whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

Some doubt was expressed in the Court of Appeal in the case of *London County Council v. West Ham Churchwardens*, [1892] 2 Q. B. 173, as to whether even this enactment added to the jurisdiction of the Court. But the point was not necessary to the decision of the case, which turned on a limitation imposed upon the general words of the section by a proviso in the preceding section, and two years later the

question was directly raised before Mr. Justice Chitty, and the Court of Appeal, in affirming his decision, unanimously decided that the necessary jurisdiction was given by the section. Lindley, L.J., said: "I have no doubt about this case. . . . Sect. 5 of the Judicature Act, 1890, was passed for the purpose, amongst other things, of getting rid of what was admitted to be an unjust anomaly; and now when money is paid in under an Act of Parliament which contains no express provisions as to the costs of payment out, and an application is made for payment out, sect. 5 hits the blot and enables the Court to award such costs": *In re Fisher*, [1894] 1 Ch. 450.

In that case it appeared that the commissioners of sewers, acting under powers conferred on them by an Act 57 Geo. III. c. xxix., which contained no provision as to the costs of payment out of court of moneys paid in under the Act, purchased certain leasehold lands and paid the purchase-money into court. A petition having been presented for payment out, an order was made for payment out, and the petitioner's costs of and incidental to the application were ordered to be paid by the commissioners.

NOTE.—This case was referred to and approved by the Court of Appeal in *In re Wrexham, Mold, and Connah's Quay Ry.*, [1900] 1 Ch. 261, a case with regard to the costs of defending certain proceedings against a railway company not provided for by the Railway Companies Acts.

The above section of the Judicature Act, 1890, also applies to cases where the application of sect. 80 is excluded by the following words, "except where such monies shall have been so deposited by reason of the wilful refusal of any party," &c. (see *In re Schmarr*, *post*).

It is to be observed, however, that the section (sect. 5 of the Judicature Act, 1890) applies only to "proceedings in the Supreme Court." It does not, for instance, appear to give any power to order the payment of costs of reinvestment in land: *In re Schmarr*, [1902] 1 Ch. at p. 330.

II. When sect. 80 applies.

By sect. 1 of the Lands Clauses Act, 1845, that Act (including sect. 80) applies to every undertaking authorised by any subsequent Act authorising the purchase or taking of lands for such undertaking save so far as the clauses and provisions of the Lands Clauses Act shall be "expressly varied or excepted" by any such Act.

(a) Where the special Act contains no provisions as to costs. No difficulty arises in this case, as the costs are then governed by sect. 80.

(b) Where the special Act contains limited provisions as to costs. These will be extended by sect. 80 if not inconsistent with it. Where,

for instance, the special Act provides for the costs of certain matters, but contains no provision for other matters, the costs of which are provided for by sect. 80, then as to those other matters the provisions of sect. 80 will apply (*see also* on this subject sect. 1, *ante*).

Illustration.

A public improvements Act of 1853 referred back to and incorporated an earlier improvements Act, which, in its turn, referred back to and incorporated a third. All three Acts were passed *after* the Lands Clauses Act, but in none of them was there any provision as to the payment by the promoters of the costs of sales and conveyances, though the earliest Act did contain provisions as to other costs:—*Held*, that the provisions contained in sect. 80 of the Lands Clauses Act as to the payment by promoters of the costs of sales and conveyances must be considered to be incorporated into the later Act, there being nothing in any of the Acts to vary or except such provisions: *In re St. Sepulchre, Westminster (Vicar)*; *In re Westminster Estate* (1864), 4 De G. J. & S. 232.

(c) Amalgamating Acts. Questions have frequently arisen where Acts passed before the Lands Clauses Act have been incorporated in whole or in part with Acts passed subsequently to 1845.

(i.) “Incorporated with the special Act.” If the special Act (that is, the Act passed after the Lands Clauses Act) does not contain and repeat the provisions which are contained in the original Act, and uses the provisions of the original Act for the purpose of effecting the purposes of the amalgamation Act, then the original Act is to be considered as an Act incorporated with the amalgamation Act: *In re Ellison’s Estate* (1856), 25 L. J. Ch. 379.

(ii.) Saving clauses in amalgamating Acts. The amalgamating Acts usually contain clauses saving the rights of parties whose interests have been affected by the original Act, and maintaining the powers conferred and the procedure directed by the original Act for certain limited purposes. The point has frequently arisen, under these circumstances, whether questions of costs were to be decided under the original Act, as saved by the clauses in question, or under the Lands Clauses Act. As a general rule the provisions of sect. 80 are more liberal to the owner at the expense of the promoters than those of earlier Acts, and the endeavour of the promoters has usually been to exclude the Lands Clauses Act and obtain the widest possible interpretation of the saving clauses. It is difficult to lay down general principles in a matter which depends on the interpretation of the Acts governing the particular case, but it may be said that there has been a tendency on the part of the Court to construe

saving clauses as applicable rather to the actual carrying out of purchases and dealings with purchase-money than to costs.

Illustrations.

(1) A sum of money was paid into court upon the purchase of certain land by a railway company, whose Act provided for the costs of obtaining money out of court. That railway was amalgamated with another railway, and the Act of the first railway was repealed. The Act of the second railway did not provide for the costs. The second railway was afterwards amalgamated with a third railway, whose Act repealed the earlier amalgamating Act and (*semble*) revived the original Act; and it was provided that where any money had been or should be paid into court by either of the dissolved companies, upon the purchase of lands, such money should be held and disposed of pursuant to the Act under which the same had been paid, and the provisions in such Act relating to the money so paid should remain in full force:—*Held*, that the costs of obtaining the money out of court must be paid by the third railway company under the provisions of the original Act: *Ex parte Chetwood, In re Chester and Crewe Ry.* (1849), 18 L. J. Ch. 418.

(2) A railway company purchased land and paid the purchase-money into court under an Act of 1833, which authorised the interim investment of such money, but was silent as to the costs of such interim investment. By an amalgamating Act of 1846 the previous Act was repealed, with a proviso that such repeal should not annul any contract or purchase of land made thereunder and that “all the clauses, provisions, powers, and authorities contained in such Act in relation to the completion of such contract and the purchase and conveyance of such land and the payment and application of the purchase-money shall for the purpose of this Act remain in full force.” And it was further provided that with respect to all purchase-moneys paid into court or stocks, funds, or securities representing such purchase-moneys “all the clauses, provisions, powers, and authorities contained in such Act in relation to such moneys, &c., and the dividends, &c., thereof shall remain in full force.” Upon a petition for an investment in the funds:—*Held*, that the promoters of the amalgamation Act must pay the costs of the interim investment, under sect. 80 of the Lands Clauses Act: *Ex parte Eton College* (1850), 20 L. J. Ch. 1. “I conceive that the intention of the Legislature, which is distinctly marked by the [Lands Clauses] Act, was to indemnify parties whose land should be taken. I think that the words admit of such a construction, and that it is the soundest construction which will give effect to the Legislature”: *per* Lord Truro, L.C., at p. 9, *ib.* The above case was followed in *In re Ellison's Estate* (1856), 25 L. J. Ch. 379; decided by the Lords Justices under the same amalgamating Act.

(3) Land was taken and the purchase-money paid into court under an Act of 1825, which provided for the costs of reinvestment in land. An amalgamating Act was subsequently passed which repealed the original Act and incorporated the Lands Clauses Act, but provided that such moneys paid into court before the commencement of the amalgamating Act should be “applied and disposed of pursuant to the repealed Act.” On petition for reinvestment in land of the money in question:—*Held*, that the costs of reinvestment were regulated by the provisions of the Act of 1825: *In re St. Katherine's Dock* (1866), 14 W. R. 978.

NOTE.—See also the following case:—

Illustration to Note.

Where purchase-money had been paid into court under a waterworks Act, which provided for the payment by the water company of the reasonable expenses of reinvestment in land, and this Act had been repealed by a later Act, but with a provision that all debts and money due should be recoverable from the company:—*Held*, that sect. 80 of the Lands Clauses Act gave jurisdiction to direct payment by the Corporation of S., to whom

the water undertaking had been transferred, of the costs of reinvestment: *Ex parte Sheffield (Vicar)*, (1904), 68 J. P. 313.

(d) Purchase carried out under private Act. Where land is taken under the powers of the Lands Clauses Act, but the actual purchase has to be carried out under the provisions of a private Act relating to the land taken, the promoters must pay costs under the Lands Clauses Act.

Illustration.

Land was taken by a railway company under the provisions of the Lands Clauses Act. The purchase had to be effected under the powers of a private Act of 1840. On a petition for the interim investment of the money it was argued for the company that, the purchase having been carried out under a private Act passed previous to the commencement of the Lands Clauses Act, the latter could not apply:—*Held*, that the company having made use of the Lands Clauses Act to acquire the land, were subject to its provisions as to costs: *In re Shuttleworth's Estate Act*, *Ex parte Shuttleworth* (1862), 7 L. T. 266.

(e) The section applies whenever money is deposited in court under the Lands Clauses Act, whether under the earlier or later sections, *e.g.*, under sect. 85.

Illustration.

A railway company, acting under statutory powers, took certain lands of which F. was the owner, and which were subject to leases. The company paid the amount (4,100*l.*) of the valuation into a bank and gave a bond under sect. 85 of the Lands Clauses Act. The purchase-money was afterwards ascertained by arbitration, but the payment of it into court did not become necessary. F., the owner, incurred considerable expense with regard to the apportionment of the rent, and presented a petition asking that his costs might be paid out of the deposit by the company:—*Held*, that sect. 80 of the Lands Clauses Act applied whenever moneys are deposited in court under the Act, whether under the earlier or the later sections; hence sect. 80 applies to money deposited under sect. 85: *In re London, Brighton and South Coast Ry.*, *Ex parte Flower* (1866), L. R. 1 Ch. 599.

(f) But the money must have been deposited “under the provisions of this or the special Act or an Act incorporated therewith.” If, therefore, the money is paid in to the credit of some action to which the promoters are not parties, or if it is paid in to an account entitled neither “In the matter of” the Lands Clauses Act or the special Act nor “*Ex parte*” the promoters, or if it is paid into a bank other than the Bank of England, the section will not apply. The question in such cases appears to be whether the fund has passed from the control of the promoters or not.

Illustration.

(1) The E. C. Railway Co. bought lands which had been mortgaged, and, the mortgagee having no known heir at law, and there having been a transfer of the mortgage, the question was who was to bear the costs of appointing someone, by vesting order or otherwise, to make the requisite conveyance. The Vice-Chancellor thought, at first, that the

company should bear them ; but the purchase-money having, for convenience, been paid into the L. and W. Bank instead of the Bank of England, and objection having been taken, it was *held* that there must be strict adherence to the terms of sect. 80, and the costs could not be allowed : *In re Eastern Counties and Tilbury Junction Ry., Ex parte Cave* (1855), 26 L. T. (O.S.) 176.

(2) Land which was the subject of an administration suit was taken by a railway company and the value thereof paid into court to the credit of the cause, with a direction that it was not to be paid out without notice being given to the company. By a mistake the account was not entitled "In the matter of" the special Act ; nor, it seems, "*Ex parte*" the promoters :—*Held*, that there was no jurisdiction to compel the company to pay the costs of any parties on the petition : *Brown v. Fenwick* (1866), 35 L. J. Ch. 241.

(3) Land subject to the provisions of a will having been taken by the New River Co., the purchase-money was paid into court in a suit to the credit of the account of the entailed estates of the testator. Upon petition for payment out of the money :—*Held*, that the payment in to the suit took the fund out of the provisions of the Lands Clauses Act, and the company had therefore been improperly served, and the petitioner must pay their costs : *Prescott v. Wood* (1868), 37 L. J. Ch. 691.

(4) In 1839 a railway company, acting under statutory powers, took part of F.'s estate and paid the purchase-money into court, to an account entitled "*Ex parte*" the company, in the matter of the Act. An order was made directing the purchase-money to be invested in Consols and carried to a separate account which was intituled "In the matter of the above-mentioned Act of Parliament." Some years later an order was made directing the fund to be carried over to an account intituled in the suit only, all reference to the company or the Act being omitted, through an oversight. The tenant for life died, and a petition was then presented for distribution of various funds standing to the credit of the cause, including the fund which had arisen from the payment made by the railway company. The company were made respondents, and the petition asked that they might pay so much of the costs as related to the payment out of last-mentioned fund. Jessel, M.R., said that the effect of the slip made was that he had no jurisdiction to order costs against the company ; and the petition must be dismissed as against them with costs : *Fisher v. Fisher* (1874), L. R. 17 Eq. 340.

(5) Land was taken by a railway company and the purchase-money paid into court to the general credit of an administration action, then proceeding, and to an account not intituled in the Lands Clauses Act or the special Acts of the company. This was done pursuant to an agreement of sale which provided that the company should pay the costs of obtaining the order for payment into court, and that after such payment the company should not be liable for any further costs beyond what they would be liable to pay under the Lands Clauses Act. A petition in the suit asked that the company might, *pursuant to the agreement*, pay the petitioner's costs of the petition as under sect. 80 of the Lands Clauses Act, and the unpaid costs, charges, and expenses of the purchase and conveyance. Fry, J., dismissed the petition, as against the company, with costs, on the ground that he had no jurisdiction to make any order on the petition against the company : *Nock v. Nock* [1879] W. N. 125.

(6) The M. Board of Works took two houses forming part of an estate, and paid the purchase-money into court. An order was afterwards made transferring the fund to the credit of an action "*Ex parte* Metropolitan Board of Works, account of estates devised by the will of Caroline Gruyard deceased." The special Act and the Lands Clauses Act were not specified :—*Held*, that the Board were liable to pay the costs of reinvestment : *Drake v. Greaves* (1886), 33 Ch. D. 609.

There appear to have been no recent decisions upon this point, which has become of small importance since the passing of the Judicature Act,

1890, under which the court has a discretion to grant costs of the proceedings in court if sect. 80 does not apply.

Illustration.

Where property had been taken under the provisions of the Lands Clauses Act and the purchase-money paid into court under sect. 76 of that Act, owing to the neglect of the owner of the property to make out a title thereto, the costs of and incidental to a petition presented by a person interested in the money to obtain payment out of court were *held* to be within the discretion of the Court under sect. 5 of the Supreme Court of Judicature Act, 1890, and no appeal will lie from the order made in the exercise of that discretion : *In re Schmarr*, [1902] 1 Ch. 326. "I think that the language of the Court of Appeal in *In re Fisher (ante)* shows clearly that in a case like the present, which *ex hypothesi* is outside sect. 80, the Court, although it could not give the costs of the reinvestment in land, has full power to give the costs of any proceedings in court" : *per* Cozens-Hardy, L.J., at p. 330, *ib.*

III. Loss of the right to costs under sect. 80.

The right to costs may be lost, under sect. 80, with respect to purchase or compensation money paid into court, by reason of—

(a) The wilful refusal of any party entitled thereto—

(i.) to receive the same ; or

(ii.) to convey or release the lands in respect whereof the same shall be payable ; or

(b) The wilful neglect of any party to make out a good title to the land required.

(a) (i.) The refusal to receive the purchase-money is wilful if without any reason the vendor refuses to receive the purchase-money, or if his reason is only capricious, but it is not wilful merely because afterwards the reason turns out to be untenable.

Illustrations.

(1) B. refused to accept the sum of 2,560*l.* which had been awarded to him for the purchase of certain lands taken by a railway company, on the ground that he believed the award to be bad in law ; and he moved to set aside the award, but the Court discharged the rule. The company had, upon B.'s refusal of it, paid the money into the bank :—*Held*, that there had not been a "wilful refusal" by B. : *Ex parte Bradshaw, In re East and West India Docks* (1848), 16 Sim. 174.

(2) In October, 1847, E. agreed to sell part of his land to a railway company, and the company were to pay the costs and expenses, including the surveyor's charges. The company were desirous of obtaining immediate possession ; and it was agreed that the purchase-money should be deposited in the hands of a banker, until the conveyance should be executed. This was done and possession given on May 3rd, 1848. The company afterwards agreed to grant E. a lease of the slopes from his land to the railway. In March, 1849, the company were ready to complete the purchase ; but E. insisted that the two transactions should be settled together. This seems to have been agreed to. The lease

was ready in March, 1850, and an appointment for completion made. On March 22nd, 1850, the railway company tendered the purchase-money and interest, and offered to pay the vendor's solicitor's bill, which amounted to 155*l.*, under protest, with 65*l.* for the charges of the vendor's surveyor, whose bill amounted to 227*l.* This the vendor's solicitor declined to receive. The company on the next day tendered to the vendor personally the purchase-money and interest, which being refused, the amount was paid into court. Upon petition by the vendor for the transfer of this sum, and the payment of the costs, charges, and expenses :—*Held*, that there had been no “wilful refusal” by the vendor, who was therefore entitled to her costs, charges, and expenses : *In re Windsor, Staines and South-Western Ry.* (1850), 12 Beav. 522. “I conceive that it would be a ‘wilful refusal,’ if, without any reason, the vendor had refused to accept the purchase-money, or if his objection had been merely capricious ; but where there is a fair objection, a party is not to be treated as having wilfully refused because the reason for his refusal happened afterwards to turn out untenable” : *per* Lord Langdale, *M.R.*, at p. 524, *ib.*

(3) A railway company being unable to come to terms with R., the owner of lands, proceeded to summon a jury. R., being advised that notice had not been properly served on him, did not appear before the jury, and the damages were then assessed in his absence and the amount paid into court. It was at a later date decided that the notice had been properly served. Upon petition by R. for payment out of the money :—*Held*, that there had not been such a refusal by R. as to disentitle him to costs : *Ex parte Railston* (1851), 15 Jur. 1028.

(4) The commissioners of R. gave D. notice that they would require a certain piece of land. The owner took advice as to the right of the commissioners, and, in consequence thereof, refused to give up the land. The purchase-money was then paid into court, but D. afterwards executed the conveyance. D. then petitioned for payment of the money out of court :—*Held*, that this was not such a case of “wilful refusal” under sect. 80 as that the owner ought to be made to pay the costs occasioned by his refusal : *Ex parte Dashwood, In re Ryde Commissioners* (1856), 26 L. J. Ch. 299.

(5) L. agreed that the question of compensation between her and the M. D. Railway Co. should be referred to a sole arbitrator, but, being dissatisfied with the award, refused the amount tendered, which the company thereupon paid into court and executed a deed poll :—*Held*, that L. had had considerable *prima facie* grounds for her refusal, and that the company must pay the costs : *Ex parte Lawson, In re Metropolitan District Ry.* (1868), 17 W. R. 186.

(6) The governors of L. Grammar School were trustees of property which the L. Corporation had power to take. The governors were persons who could sell under the powers given by sect. 7 of the Lands Clauses Act, but the price had to be fixed by arbitration or otherwise as provided by sect. 9. There was an arbitration and an award. The bare legal estate was outstanding in the Official Trustee of Charity Lands. The lands had been conveyed to the corporation by a conveyance, to which the governors, the Official Trustee and the corporation were parties. It recited an order of the Charity Commissioners that the Official Trustee should concur if required, and further recited that the money had been paid into court to an account which described the governors as trustees without power of sale. The governors joined with the Official Trustee in the conveyance. Upon a petition by the governors for the interim investment of the purchase-money and that the payment into court might be treated as made in the ordinary way under sect. 69 :—*Held*, that the Official Trustee was under no obligation to receive the purchase-money, and that his refusal to receive such purchase-money was not “wilful refusal to receive” within the meaning of sect. 80 so as to relieve the corporation from the costs of reinvestment : *In re Leeds Grammar School* (1900), 70 L. J. Ch. 89.

- (ii.) There is a wilful refusal to give up possession if it is refused without proper grounds, or if the vendor imposes improper conditions (*e.g.*, that his solicitor's costs in the arbitration should first be paid). But it is not wilful if the refusal is owing to the promoters making requirements (such as stamping reconveyances) which they are not under the circumstances entitled to make, nor is it wilful if the lands are encumbered to an amount greater than the value of the land so that the vendor cannot convey, nor if the owner has counsel's opinion that the promoters have no right to take the land.

Illustrations.

(1) A tenant at will having agreed to give possession of certain lands to a railway company for 23 $\frac{1}{2}$ %, afterwards refused to give possession, unless his sister, who was alleged to have a similar interest in the premises, was also satisfied. An offer was made to pay the money on his giving possession, but it was not formally tendered. The company having lodged the agreed sum in court to the separate credit of the tenant, solely alleging in the warrant his refusal to accept it as the reason for the lodgment, the court *held* that the tenant was entitled to draw the whole sum out of court, but refused to give costs, holding each party to have been in fault: *In re Irish South-Eastern Ry., Ex parte Kelly* (1849), 12 Ir. R. Eq. 398.

(2) A small plot of land belonging to D. was required by a railway company: 600*l.* compensation was awarded for it, but the land was found to be subject to a mortgage and judgment debts. The company thereupon paid the money into court and executed a deed poll:—*Held* that, the owner being unable to clear off incumbrances greater in amount than the value of the land, there had been no "wilful refusal" by him: *In re Crystal Palace Ry., In re Divers* (1855), 1 Jur. (N.S.) 995.

(3) The Commissioners of Ryde gave D. notice that they would require a certain piece of his land. D. took counsel's opinion as to their right to take it, and, being advised that the Court would be against the alleged right to take, refused to give up the land. The purchase-money was then paid into court under the Lands Clauses Act, but afterwards D. executed the conveyance:—*Held*, that there had not been such a "wilful refusal" as that D. could be required to pay the costs occasioned by his refusal: *Ex parte Dashwood, In re Ryde Commissioners* (1856), 26 L. J. Ch. 299, *ante*, p. 484.

(4) The purchase-money and compensation payable by a railway company were ascertained by arbitration, the title had been approved, and a deed of assignment prepared. The company objected to the amount of the vendor's costs; the vendor insisted that the costs should be paid with the purchase-money before possession was taken. The company thereupon tendered the amount of the purchase-money, but the vendor rejected it. Possession being withheld, the purchase-money was paid into court. A petition was afterwards presented by the vendor for payment of the money out of court:—*Held*, that there had been a "wilful refusal" on the part of the vendor to receive the purchase-money, and therefore that he was not entitled to costs: *In re Turner's Estate* (1861), 10 W. R. 128.

(5) Certain property in Epping Forest having, under a statute, to be given up for the public use, compensation became payable, and the B. Land Society bought back the land from members of the society to whom it had been allotted, repaying the purchase-money.

The allottees reconveyed the plots to the trustees of the society, the reconveyances being endorsed on the original conveyances, but the reconveyances were not stamped within the proper time after execution. The arbitrator determined the amount of compensation payable by the conservators to the society, and the society furnished an abstract of title to the conservators, to which the conservators objected that the reconveyances ought to be stamped, and they required the society to have them stamped at their own expense. No other objection was taken. The matter was referred to the arbitrator, who was of opinion that the reconveyances need not be stamped, but that it would be sufficient if the allottees joined in the conveyance to the conservators. The conservators would not accept this offer, but paid the compensation money into court, and the society petitioned for payment of the money into court :—*Held*, that it was not necessary that the reconveyances should be stamped ; that the conservators ought to have been satisfied with the conveyance offered them by the society ; and that the conservators must pay the costs of the petition : *Ex parte Birkbeck Freehold Land Society* (1883), 24 Ch. D. 119.

(b) There is a wilful neglect to make out title if it is not delivered within thirty days, pursuant to a statutory notice.

Illustrations.

(1) Upon certain property belonging to D. being taken by a corporation, the purchase-money was lodged in court ; but D. failed to deliver any statement or abstract of his title to the premises within thirty days, pursuant to the statutory notice under the Railways (Ireland) Act, 1851 :—*Held*, that this neglect constituted wilful neglect to make out a title within the statute, and D. must therefore bear the costs of the application for payment out of court : *In re Corporation of Dublin, Ex parte Dowling* (1881), 7 L. R. Ir. 173.

(2) The London School Board gave notice to take certain land belonging to a vestry, and required the latter to show their title to the land. The vestry, however, were advised not to do this, but to leave the Board to take possession. The Board then executed a deed of poll and paid the purchase-money into court :—*Held*, that there had not been a “wilful refusal” to show title, and therefore the Board must pay the costs according to the Act : *In re St. Luke's Vestry* [1889] W. N. 102.

IV. To whom costs are payable.

A. Tenant for life and remainderman.

- (a) In cases of investment or reinvestment of the purchase-money it is necessary that the tenant for life should be before the court, and he will have his costs ; but it is not necessary to serve remaindermen or persons having charges on the estate, and such persons if served will not get costs from the promoters.

Illustrations.

(1) Lands, part of a settled estate, were taken and the purchase-money paid into court. A petition was presented by the tenant for life for the investment of part of the money in other lands, and for a reference to the master to approve the proposed purchase and the title :—*Held*, that it was unnecessary to serve the petition for confirmation of the purchase upon any of those entitled in remainder : *Ex parte Staples, In re Browne and Oxford and Bletchley Junction Ry.* (1852), 1 De G. M. & G. 294.

(2) Upon a petition by the tenant for life of a fund paid into court by a railway company praying for the investment of the fund and payment of the dividends to the petitioner, certain persons entitled to a charge on the real estate in respect of which the fund was paid being served with the petition and appearing, the Court refused to direct the railway company to pay their costs : *In re Webster* (1854), 2 Sm. & G. App. vi.

(3) The tenant for life of real estate demised a part by way of mortgage for ninety-nine years should she so long live. A portion of the property—including that subject to the mortgage—was afterwards acquired by a railway company. A petition for investment asked that the costs of the petitioner and of the mortgagee might be paid by the company. Stuart, V.-C., made the usual order for investment, but refused to give more than one set of costs : *In re Thomas* (1864), 12 W. R. 546.

(4) Where the purchase-money of certain settled estates, which were the subject of a private Act, requiring the sanction of the Court to a reinvestment in land, had been paid into court by a railway company and a petition was presented by the tenant for life for reinvestment thereof in land, and served upon the trustees and remainderman, according to the provisions of the private Act :—*Held*, that the company was not bound to pay the costs of the trustees or remainderman : *In re Bowes* (1864), 10 Jur. (N.S.) 817.

(5) A petition asked for the sanction of the Court to the application of purchase-money in court to the redemption of tithe rent-charge :—*Held*, that it was unnecessary to serve the remaindermen : *In re Commissioners of Church Temporalities in Ireland, Ex parte Lord Leconfield* (1874), 8 Ir. R. Eq. 559.

(6) "Then it is said that it was very improper to serve the trustees and an uncle of the tenant for life, who had a charge on the estate for 13,333*l*. Considering that all these repurchases of land are made under the direction of this Court, I am of opinion that it is quite sufficient to bring the tenant for life before the Court, and it is quite unnecessary to serve either the remainderman or persons who have charges on the estate. That it is not necessary to serve the remainderman was decided by the Court of Appeal in the case of *Ex parte Staples* (1852), 1 De G. M. & G. 294" : *per* Malins, V.-C., in *In re Gore-Langton's Settled Estates* (1875), L. R. 10 Ch. at p. 330.

(7) A petition was presented by a tenant for life asking for the investment in bank annuities of purchase-money paid in by a railway company under the Lands Clauses Act, and for payment to him of the dividends. The estate was subject to charges in favour of a jointress, portioners, and ordinary mortgagees. The tenant for life had also incumbered his estate. The petition was served upon the incumbrancers whose charges were prior to the interest of the tenant for life, but not upon the incumbrancers of the life estate :—*Held*, that it was unnecessary, upon a petition for the interim investment of purchase-money and for payment of dividends to a tenant for life, to serve persons having charges on the inheritance, and that their costs could not be allowed : *In re Morris* (1875), L. R. 20 Eq. 470.

(8) A tenant for life petitioned the Court for interim investment of the purchase-money of land forming part of the settled estate which had been taken. The trustee of the settlement was served, as representing the remaindermen, and 4*s*. tendered to him for his costs :—*Held*, that it was not necessary to serve the trustee or remainderman when the petition was simply for investment in Consols : *In re Dowling's Trusts* (1876), 45 L. J. Ch. 568.

(9) Where a tenant for life sold, as such, under the provisions of the Lands Clauses Act, and not under the Settled Land Acts, it was *held*, by Chitty, J., that the cost of reinvestment must be borne by the purchaser : *In re Bentinck (Lady) and the London and North-Western Ry.* (1895), 12 T. L. R. 100 ; and *see* sect. 56 of the Settled Land Act, 1882.

- (b) Where there is a leaseholder (the lease having been created before notice to treat) the tenant for life is not competent to act for him, and the costs of the lessee must be paid by the promoters.

Illustration.

"The general rule is that the tenant for life, and he alone, should appear, and the Act of Parliament authorises him to deal with the company on behalf of all parties. But where there is a leaseholder, the tenant for life is not competent to act for him, but he must be settled with separately. If this lease had been made after the notice to treat, it would have been different, but, as the case stands, I think the corporation must pay the costs of the trustees, who are, in fact, the tenants of the immediate freehold of this land": *per* Kindersley, V.-C., in *In re Finch* (1866), 14 W. R. 472.

- (c) Where the application involves payment out of part of the purchase-money the remainderman should be before the Court, and his costs must be paid by the promoters.

Illustrations.

(1) Two estates, settled upon different tenants, were jointly charged with certain incumbrances, which, by arrangement between the two tenants for life, were paid off by them out of their private moneys in certain proportions. Part of one of the estates was taken by a railway company and the purchase-money paid into court:—*Held*, upon petition by the tenant for life of the land taken by the company for payment out to him of the amount of the incumbrance paid off by him, and for the investment of the balance of the fund, that the company must pay the costs of appearance of the persons interested in remainder expectant on the life estate of the tenant for life: *In re Romney, In re Furness Ry. Act* (1863), 3 N. R. 287.

(2) Land which was subject to the trusts of a will upon trust for the separate use of A., a married woman, with remainder to her children as she should appoint, and in default, to them as tenants in common, was taken by a railway company and the purchase-money paid into court. A. and the two trustees then presented a petition for the transfer of the fund in court to the trustees of the will, one of whom was a solicitor, and the firm of which he was a member acted as solicitors to the trust and also as solicitors for the petitioners and respondents. Kay, J., declined to order payment out upon the ground that the remaindermen were not represented by a separate solicitor, and with this discretion the Court of Appeal declined to interfere: *In re Smith, Ex parte London and North-Western Ry.* (1888), 40 Ch. D. 386.

- (d) Where the application is for reinvestment other than in land, Consols, &c. (*e.g.*, in building or rebuilding on the settled estate) the remainderman and trustees ought to be served.

Illustrations.

(1) A railway company had paid into court the purchase-money of houses let at a rack rent settled to the separate use of a married woman for life, with remainder over. The husband and wife petitioned for investment and payment of dividends. It appeared that the income was less than the former rental. The remainderman was made a respondent:—*Held*, that the remainderman was a "party interested" within sect. 74 of the Lands Clauses

Act, and that his costs must be paid by the company : *In re Crane's Estate* (1869), L. R. 7 Eq. 322.

(2) Where a petition asked for the sanction of the Court to the reinvestment of purchase-money of land taken in the erection of buildings and the execution of repairs, and the remaindermen had not been served, the petition was ordered to be reheard ; and it was *held* that when it is sought to reinvest the purchase-money of settled land otherwise than in other land, the remaindermen and also the trustees must be served with the petition, so as to have the opportunity to object : *In re Leigh's Estate* (1871), L. R. 6 Ch. 887.

B. Trustees and *cestui que trust*.

(a) Generally. When trustees are entitled to their costs.

NOTE.—As to trustees of marriage settlements, *see* p. 503, *post*.

Illustration.

(1) Trustees for sale of lands in settlement which were afterwards sold under the provisions of the London Bridge Act, 1830, were *held* entitled to their costs out of the *corpus* of the fund arising from the sale : *Ex parte Layfield* (1834), 1 Y. & C. 79.

(2) Devisees of lands in trust for charitable purposes having sold part of those lands under the provisions of the London Bridge Acts were *held* not entitled to their costs out of the fund arising from the sale, although the will creating the trust directed that the estate should defray the expenses of defending the trust property : *Ex parte Towgood, In re London Bridge Acts* (1835), 1 Y. & C. 588.

(3) A petition was presented by a tenant for life of realty which was being administered by the Court for the investment of the purchase-money of part of the property taken by a railway company in the purchase of other lands :—*Held*, that the railway company was not liable to pay the costs of appearance of reversioners and trustees, but only the costs of service upon them of the petition : *Wilson v. Foster, In re Lancashire and Yorkshire Ry.* (1859), 5 Jur. (N.S.) 113.

(4) Where the trustees of lands, part of which was taken, had been served and appeared on a petition by the tenant for life for investment of purchase-money, their costs were allowed as against the promoters : *In re Cleveland's (Duke) Harte Estates* (1860), 1 Dr. & Sm. 46.

(5) L. was tenant for life of lands in strict settlement. The lands were taken by a railway, who paid the purchase-money into court. On a petition for payment out for investment in land :—*Held*, that the remaindermen ought to be served, but that the company would not be ordered to pay any costs other than those of the petitioner ; costs of other necessary parties must come out of the fund : *In re Legge's Estate* (1860), 8 W. R. 559.

(6) B. was tenant for life of lands settled by a private Act of Parliament. A railway company took part of the lands and paid the purchase-money into court. B. petitioned for payment out for investment in land to be conveyed to the trustees under the private Act. The petition was served on the trustees and remainderman, who appeared and consented :—*Held*, that the railway company were not liable to pay the costs other than those of the petitioner : *In re Bowes' Estate* (1864), 12 W. R. 929.

(7) Where the land taken was subject to a lease for ninety-nine years, if the lessee should so long live :—*Held*, that the company must pay the costs both of the lessee and the trustees in whom the freehold was vested, but not any of the parties entitled in remainder : *In re Finch* (1866), 14 W. R. 472.

- (b) If the money stands to the credit of a cause as well as of a matter under the Act, all parties interested, or the trustees representing them, must be served, and their costs must be paid by the promoters.

Illustration.

A petition by a tenant for life for reinvestment in land of money paid into court by a company under the Lands Clauses Act, and standing to the credit of a cause as well as of the matter of the Act, must be served upon all parties interested in the money, or, if they are represented by trustees, upon such trustees, and the company must pay the costs of the persons so served: *Bradshaw v. Fane* (1862), 1 N. R. 159.

- (c) Trustees of land subject to a Chancery suit taken by a railway company must, unless the Court has directed otherwise, serve all parties to the suit, and their costs must be paid by the promoters.

Illustrations.

(1) Trustees of lands which are subject to a suit in Chancery must, unless they have the express direction of the Court to act without the concurrence of the parties to the suit, serve them, and the costs thereof must be borne by the company: *In re Brandon's Estate, Brandon v. Brandon* (1862), 2 Dr. & Sm. 162.

(2) Land which was the subject-matter of a suit was taken by a railway company, and a petition was presented by the trustees for the confirmation of the contract of sale. The tenants for life, who were parties to the suit, were served with the petition:—*Held* that, this service being necessary, the company must pay the costs of the parties served, including their costs of appearance: *Haynes v. Barton* (1866), L. R. 1 Eq. 422.

- (d) If the money is carried over to the account of trustees and dividends are directed to be paid to them, the trustees have the right to appear on the application by persons entitled to the fund, and to have their costs from the promoters.

Illustration.

Land which was subject to the trusts of a will was taken and the purchase-money paid into court and carried over (the company being represented) to the account of the trustees, and the dividends were directed to be paid to them until further order. Upon petition afterwards by the persons entitled to the fund:—*Held*, that in the circumstances, the trustees had a right to appear and to have their costs of so doing: *In re Burnell* (1864), 12 W. R. 568.

- (e) Where the purchase-money of land vested in trustees is paid into court they are entitled to appear separately and to have their costs.

Illustration.

Land vested in a trustee was taken by a railway company and the purchase-money paid into court. The *cestui que trust*, having become absolutely entitled, presented a petition

for payment out. The trustee was separately represented at the hearing :—*Held*, that the company ought to pay the costs of such appearance : *Ex parte Metropolitan Ry.* (1868), 16 W. R. 996.

(f) If trustees have a power of sale, the Court may dispense with the necessity of the beneficiaries being served.

Illustrations.

(1) Land which was limited to trustees in trust to sell after the death of B., a tenant for life, was taken by a company before the death of B. and the money paid into court. After the death of B., the trustees applied for payment of the money to them, not serving the petition on the *cestui que trusts*. Wood, V.-C., made the order for payment out without requiring the presence of the *cestui que trusts* : *In re East* (1853), 2 W. R. 111.

(2) A fund in court representing the purchase-money of leaseholds was ordered to be paid out to trustees having a power of sale, the *cestui que trust* being an infant : *In re Gooch's Estate* (1876), 3 Ch. D. 742.

(3) Purchase-money in court may be ordered to be paid out to trustees having a power of sale, as persons "absolutely entitled," under sect. 69 : *In re Hobson's Trusts* (1878), 7 Ch. D. 708.

NOTE.—In each of the above three cases the company did not oppose the application.

c. Mortgagee (see *per* Wood, V.-C., in *Eden v. Thompson* (1864), 2 H. & M. at p. 8).

(a) Where the petition is for payment out or for the reinvestment of the fund in land, mortgagees should be served with a copy of the petition and notice given to them that if they appear their costs will be objected to, and a tender of 30s. made to them under R. S. C. Ord LXV. rule 27 (19) : this sum of 30s., together with the costs of an affidavit of service, must be paid by promoters. In some of the earlier cases, however, the promoters were, and in others were not, ordered to pay the costs of appearance of incumbancers.

Rules of the Supreme Court.—Ord. LXV. rule 27 (19) is as follows : "Where any petition in a cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be 1*l.* 10s. The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise ; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or judge shall consider the party entitled, notwithstanding such notice or tender, to appear in court. In any other case in which a solicitor of a

party served necessarily or properly peruses any such petition, without appearing thereon, he is to be allowed a fee not exceeding the amount aforesaid."

Illustrations.

(1) Part of the lands of which Y. was the tenant for life was taken by a railway company. Another portion was subject to a mortgage of 471*l*. The petition prayed that this mortgage might be paid off out of the purchase-money :—*Held*, that the company could not be made to pay the costs of the mortgagee's appearance and being served with the petition : *Ex parte Yeates, In re Lancaster and Carlisle Ry.* (1848), 12 Jur. 279.

(2) A tenant for life contracted with a corporation, enabling the latter to take a further supply of water from a river, and the agreed compensation (6,000*l*.) was paid into court. A petition was then presented by the tenant for life asking that the money might be paid out to L. in part discharge of his mortgage on the estate :—*Held*, that the company was not bound to pay the mortgagee's costs of appearance : *In re Hatfield's* (or *Hadfield*) *Estate* (1863), 29 Beav. 370 ; 32 Beav. 252.

(3) P. devised land subject to incumbrances to trustees upon trust to pay off the charge, and subject to the charge to B. for life, with remainders over. B. mortgaged his life interest. Part of the land was taken by a railway company and the purchase-money paid into court ; on petition for payment out to the surviving trustee of P.'s will :—*Held*, that the costs of the mortgagee of B.'s life interest, who appeared, must be paid by the company : *In re Brooke* (1864), 12 W. R. 1128.

(4) Upon a petition by a tenant for life for the investment of money paid into court by a railway company, the encumbrancer of the life estate, being served, is entitled to have his costs of appearance from the company : *In re Smith* (1866), 14 W. R. 218.

(5) A., a co-trustee with P. of various trust funds, having discovered that P. had a large sum in his hands, called upon him to give security for the amount, whereupon P. assigned to A. all his interest under the will of D., a testatrix. Later in the same day P. executed to R. and N. a conveyance and assignment of all his property for the benefit of his creditors. The executor and trustee of D.'s will having received certain sums in respect of her estate and paid the balance into court, A. petitioned for the payment of the fund to him, after taxation and payment of costs. The petition was served on the executor and trustee, and on the assignees of P.'s trust deed :—*Held* that, the appearance of the assignees being of doubtful necessity, the Court would have considered whether such appearance was justifiable or not, if a sum of 40*s*. [now 30*s*.] had been tendered to enable legal advice to be obtained, but that, no such offer having been made in this case, the petitioner must pay the assignees' cost of appearance : *In re Duggan* (1869), L. R. 8 Eq. 697 ; followed in *Wood v. Boucher, infra*. "If a petitioner, when he serves a petition, at the same time offers the respondent 40*s*. in order to enable him to get the advice of his solicitor as to whether he shall appear or not, and the respondent after that appears, the Court will consider whether such appearance be justified or not ; and if it finds that it is not justified, will not order the petitioner to pay the costs of the respondent's appearance ; otherwise it will" : *per James, V.-C.*, at p. 698, *ib*.

(6) Where the petitioner does not, on serving the petition upon a respondent whom it is necessary to serve, but who has no interest in the matter, tender a sum in respect of costs, the petitioner must pay the costs of the respondent's appearing : *Wood v. Boucher* (1870), L. R. 6 Ch. 77.

(7) The costs of incumbrancers subsequent to the payment into court must be borne by the party creating the incumbrance : *In re Jones's Trust Estate* (1870), 18 W. R. 312.

(8) "This petition states the mortgage, and also that the mortgagees were willing to consent to the payment of the fund to the petitioners. Therefore, considering that they are stated to concur in the petition, I think they would not have appeared if 40s. [now 30s.] had been tendered them. The case thus comes strictly within the rule laid down by the Court of Appeal, and I cannot allow more than 40s. costs of appearance. But Mr. Colt says that it would be necessary to satisfy the Court of the fact of the service. I think, therefore, that it will be proper to allow the 40s. and so much more as the costs of an affidavit of service would have come to": *per* Malins, V.-C., *In re Halstead United Charities* (1875), L. R. 20 Eq. at p. 49.

(9) Upon the presentation of a petition simply for the investment in land of money paid into court under the Lands Clauses Act, where there are mortgages or annuities charged upon the estate, the proper course is to serve the mortgagees or annuitants with a copy of the petition and 40s. costs, with an intimation that if they appear they will be liable to pay their own costs: *per* James, L.J., in *In re Gore-Langton's Estates* (1875), L. R. 10 Ch. 328.

(10) Land subject to a mortgage was taken by a railway company and the purchase-money paid into court. On a petition by the mortgagor for payment out, the mortgagee appeared and consented to take payment of his security out of the money paid out:—*Held*, that the mortgagee was entitled to have his costs paid by the company: *In re Waterford, Dungarvan and Lismore Ry.* (1877), 11 Ir. Eq. R. 321.

(11) Money had been paid into court by the M. Board of Works, under the Artizans and Labourers' Dwellings Act, for purchase of land subject to a mortgage. On petition for payment out, which had been served on the mortgagee:—*Held*, that the Board must pay, in addition to the petitioner's costs, 42s. [now 30s.] for the mortgagee's costs, and the costs of the affidavit of service on the mortgagee: *Ex parte Jones, In re Artizans and Labourers' Dwellings Improvement Act*, 1875 (1880), 14 Ch. D. 624.

(12) The mortgagees of certain interests under a will were served with the petition, but no tender for costs was made to them by the petitioner. The petitioner asked that the costs of the petition and all other proper parties to the petition might be taxed and paid out of the fund in court. The mortgagees appeared and admitted that the interests mortgaged to them were void, but asked for costs. Kay, J., said that, in the circumstances, he should not deprive the mortgagees of costs altogether, but should allow each of them the sum of two guineas out of the petitioner's share of the fund: *Somes v. Martin* [1882] W. N. 113.

(13) After payment into court of the purchase-money of land belonging to a tenant for life and remaindermen, some of the latter mortgaged their interest in the fund. On the tenant for life's death, the owners of the fund and their incumbrancers presented a petition for payment out:—*Held*, that the promoters were not liable for the costs incurred by the mortgagees in proving their incumbrances: *In re Gough's Trusts, Ex parte Great Western Ry.* (1883), 24 Ch. D. 569.

(14) Land which was subject to the trusts of a will was acquired by a corporation and the purchase-money paid into court. One of the reversioners mortgaged her interest after the payment into court. The tenant for life having died, a petition was presented for payment out, and service was made upon the mortgagees:—*Held*, that the mortgagees were entitled to have their costs (limited, however, to 42s.) paid by the corporation, notwithstanding the fact that the mortgage was created after the property had been taken by the corporation: *In re Olive's Estate* (1890), 44 Ch. D. 316; *In re Gough's Trusts* (*supra*), dissented from, and *In re Jones's Trust Estate* (*supra*), not followed.

(15) A local authority purchased land which was subject to a mortgage and paid the purchase-money into court. The mortgagor petitioned for payment out, and served the

mortgagee with the petition:—*Held*, that the amount to be allowed the petitioner in respect of the mortgagee's costs was 30s., and the costs of affidavit of service on him: *In re Ruck's Trusts* (1895), 13 R. 637.

- (b) Where the petition is for interim investment and payment of the dividends to the tenant for life, incumbrancers need not be served, and their costs, if served, will not have to be borne by the promoters.

Illustrations.

(1) Upon a petition for reinvestment of purchase-money, a railway company ought not to be ordered to pay the costs of the appearance of persons holding mortgages on a life estate in the land taken: *Ex parte Smith, In re Lancashire and Yorkshire Ry.* (1849), 6 Rail. Cas. 150.

(2) A railway company was ordered to pay the costs of mortgagees who had been served with and appeared upon a petition for the investment in Consols of compensation money which had been paid into court: *In re Brook's Will* (1861), 5 L. T. 388.

(3) Land which was subject to a mortgage was taken by a railway company. On a petition for the investment of the purchase-money, and payment of the dividends to the tenant for life, the Court refused to order the mortgagee's costs to be paid by the company: *In re Thomas* (1864), 12 W. R. 546.

(4) Where a railway company has paid the purchase-money of land into court under the Lands Clauses Act, and the tenant for life petitions for interim investment and payment of the dividends, persons having charges on the inheritance prior to the life estate need not be served, and their costs, if served, will be disallowed as against the company: *In re Morris' Settled Estates* (1875), L. R. 20 Eq. 470.

- (c) If the mortgagee is in possession, the promoter must pay his costs.

Illustrations.

(1) On a petition by a tenant for life for the investment of purchase-money paid into court for land which had been mortgaged for the benefit of the petitioner's creditors, a receiver of the rents and profits of which had been appointed by deed, and where the mortgagees and receiver had been served, and appeared:—*Held*, that the company must pay all the costs: *In re Nash* (1855), 1 Jur. (N.S.) 1082. Where a mortgagor neglected or failed to procure the concurrence of the incumbrancers in a petition for the investment of purchase-money paid into court by a railway company:—*Held*, that such neglect or failure was no ground for relieving the company from the payment of costs: *Ib.*

(2) Land of which H. was tenant for life was taken and the purchase-money paid into court. Mortgages had been created upon the lands, but the mortgagees were not in possession:—*Held*, that if the tenant for life had been out of possession it would have been necessary to serve the mortgagees: *In re Hungerford's Trusts* (1857), 3 K. & J. 455; see *In re Gore-Langton's Estates* (1875), 32 L. T. 785, *post*.

(3) B. mortgaged land to W., who went into possession. Subsequently B. filed a petition for liquidation. The L. School Board took the land under the Lands Clauses Act and paid the purchase-money into court. The trustee in the liquidation petitioned for an inquiry of what was due to W. on his mortgage and payment out of the fund:—*Held*, that the Board must pay the costs of the inquiry: *In re Bareham* (1881), 17 Ch. D. 329.

- (d) In the case of mortgages registered in the books of a company, where service of the petition is made on the company and also on its solicitor, only one sum of 30s. need be tendered.

Illustration.

(1) M. being registered in the book of mortgages of a company as the holder of a debenture, service of a petition to the Court was made upon both the company and its solicitor, and one sum of 40s. tendered; but the solicitor to the company claimed a second 40s. :—*Held*, that the tender of one sum was enough: *In re Mitchell* (1881), 17 Ch. D. 515.

n. Annuitants.

Annuitants, where their rights are not affected by the petition, are in the same position with regard to their costs as mortgagees.

Illustrations.

(1) A company paid money into court for the purchase of land which was subject to an annuity. No conveyance had been made. The Court *held* that no service on the annuitant was necessary, and directed the dividends to be paid to the petitioner: *Ex parte Cofield* (1847), 11 Jur. 1071.

(2) "Whenever there is a petition simply for the investment of money in land, and there are mortgagees or annuitants whose rights are not otherwise affected by the petition, the proper course will be to serve such mortgagees or annuitants with a copy of the petition, and to pay them 40s. [now 30s.] for costs, giving them at the same time an intimation that if they appear upon the hearing they will probably have to pay their own costs": *per James, L.J.*, in *In re Gore-Langton's Settled Estates* (1875), L. R. 10 Ch. at p. 333.

E. Lessor.

If a right of re-entry has come into existence, the lessor is an incumbrancer for the amount of rent in arrears, and must be paid his costs by the promoters upon a petition by the lessee for payment out.

Illustration.

Land subject to a lease was taken by a railway company and the purchase-money paid into court. At the date of the award rent was due to the lessor, who had the usual right of re-entry for non-payment of rent. After the purchase of his interest the lessor gave notice to the railway company of his claim to have his unpaid rent satisfied out of the fund in court claimed by the lessee. He was thereupon served with notice of the petition (presented by the lessee's trustee in bankruptcy and his mortgagees) and appeared at the hearing, although not served or made a formal respondent. His claim was settled by the petitioners:—*Held*, that the right of re-entry was an incumbrance on the leasehold interest, and hence on the fund in court, and notice having been given by the railway company to the lessor, he was rightly before the Court for their protection, and the company must pay his costs: *In re London Street, Greenwich, and London Chatham and Dover Ry.* (1887), 57 L. T. 673.

F. Secured rent-charge.

Where the rent-charge is fully secured on property not taken, service of a petition for payment out on the person entitled is unnecessary.

Illustration.

A public body took, under statutory powers, land subject to small rent-charges, which, however, were amply secured on other land, and paid the purchase-money into court :—*Held*, on petition for payment out, that service on the persons entitled to these charges was unnecessary : *Ex parte Mercers' Co.* (1879), 10 Ch. D. 481.

G. Legatees.

If a person seised in fee dies leaving his real estate charged with the payment of legacies, the promoters are not liable to pay the legatees' costs upon a petition for payment out.

Illustration.

A railway company purchased land subject to a mortgage from T., who was seised in fee and the money was paid into court. T. died, leaving his real estate charged with legacies :—*Held*, that the costs of the legatees, upon a petition for payment out, must be paid by the petitioners : *In re Turner, Ex parte Oxford and Rugby Ry.* (1854), 2 W. R. 441.

H. Executors of tenant for life.

Upon an application by a remainderman for transfer of a fund, promoters are not liable for the costs of the executors.

Illustrations.

(1) Land which was devised by a will dated in 1795 was taken by a railway company in 1839 and the purchase-money paid into court. The tenant for life died in February, 1853. In October, 1853, the remainderman petitioned for transfer of the fund and payment of the dividend :—*Held*, that the costs of the executors of the tenant for life must be paid by the petitioner and not by the company : *In re Longworth's Estate* (1853), 1 K. & J. 1.

(2) S., the owner of an estate, after having devised it to an infant, agreed, under compulsion, to sell a portion of it to a railway company. S. died before the completion of the purchase without having altered his will :—*Held*, that the executors, and not the devisee, were entitled to the purchase-money and to the compensation for severance ; and that the railway company must pay the costs of the infant devisee : *In re Manchester and Southport Ry.* (1854), 19 Beav. 365.

(3) Where land belonging to an infant was sold to a company and the purchase-money paid into court, upon a petition presented by the infant, on attaining twenty-one, for payment of the fund, part to himself and part in satisfaction of a debt due to the estate of his guardian, one of whose executors he was, the Court refused to allow the costs of the other executors appearing on the petition : *In re Sinclair* (1867), 16 L. T. 474.

K. (a) Persons having interests which are not adverse *inter se* ought to join in the same petition.

Illustrations.

(1) Where seven petitions were presented to the Court for the distribution of a fund in court representing land held in undivided shares, and two of the persons entitled appeared by the same solicitor:—*Held* that, the interests of these two not being adverse, they ought to have joined in one petition, and the promoters were only liable for one set of costs: *In re Nicholls' Trust Estates* (1866), 35 L. J. Ch. 516.

(2) Upon a petition by a married woman, by her next friend, for the interim investment of the purchase-money of certain leaseholds to the rents of which she was entitled for her separate use, and which had been taken under statutory powers:—*Held*, that her husband should have been made a co-petitioner (not a respondent), he having no adverse interest to his wife, and therefore his costs must not be borne by the promoters: *In re Osborne's Estate* [1878] W. N. 179.

- (b) A person entitled to an aliquot share of the fund is entitled to his costs of the petition for payment out, and need not serve the same on other persons entitled.

Illustrations.

(1) A person who is entitled to an aliquot share of the purchase-money paid into court for land taken may, upon petition, obtain payment of such share without serving the petition upon the other persons entitled: *In re Midland Ry.* (1847), 11 Jur. 1095.

(2) The Commissioners of Works purchased houses from two tenants in common in 1855, and the purchase-money was paid into the bank to their credit. One of them died in 1859, and her representatives petitioned for payment of her share out of court:—*Held*, that the Commissioners must pay the costs of the petition: *In re Edmeade* (1860), 8 W. R. 327.

L. Persons properly served but having no interest are not entitled to their costs of appearance; but where there is a doubt as to the necessity of their appearance, they should at the time of service be offered 30s. to enable them to obtain advice, and if they appear the question whether they were justified in so doing will be considered at the hearing.

Illustrations.

(1) Of two defendants to a bill, only one demurred, and the demurrer having been allowed by the Vice-Chancellor, the plaintiff appealed. The order for setting down the appeal was served upon the other defendant's solicitor, who afterwards received a letter from the plaintiff's solicitor asking him whether he would consent to have the appeal advanced. That defendant appeared at the argument, but was not allowed to be heard:—*Held*, that he was not entitled to his costs of appearing: *Crawshay v. Thornton* (1837), 2 Myl. & Cr. 1.

(2) A person who, from the heading of an account of a fund in court, was properly served with a petition as to the fund, but had then no interest in it, was *held* not entitled to his costs of appearance: *In re Corentry (Justices)* (1854), 19 Beav. 158.

(3) Persons upon whom service of a petition was unnecessary, and persons necessarily served but claiming no interest in the subject-matter of the petition, were *held* by Malins, V.-C., entitled to their costs of appearing at the hearing of the petition: *Clark v. Simpson* (1868), L. R. 6 Eq. 336; but see now R. S. C., Ord. LXVI. rule 27 (19).

M. When a vendor of land proposed to be purchased for reinvestment is served and appears, the petitioner, and not the promoters, must pay his costs.

Illustration.

Upon a petition for the reinvestment of the purchase-money of lands taken by a railway company in other land, the petitioners served the vendors of the land in which it was proposed that the reinvestment should be made. These vendors, appearing on the petition, were ordered to have their costs as against the petitioners, but the petitioners were not to have such costs as against the company: *In re Dylar's Estate* (1855), 1 Jur. (N.S.) 975.

N. Upon an application by the committee of a lunatic for leave to invest, the costs of the heir at law and next of kin of the lunatic must be paid by the promoters.

Illustrations.

(1) The costs of and incident to an inquiry as to the propriety of a contract between the committee of a lunatic and a railway company for a sale of part of the lunatic's land were directed to be paid by the company: *In re Taylor, In re York and North Midland Ry.* (1849), 1 H. & Tw. 432.

(2) The committee of a lunatic's estate entered into a contract for the sale of a portion of the estate to a railway company. It became necessary that the heir at law of the lunatic should attend before the master:—*Held*, that the company must, under sect. 80, pay the costs of the heir at law: *In re Walker* (1851), 7 Rail. Cas. 129.

(3) A person of unsound mind, not so found by inquisition, having been made respondent to a petition presented by a railway company, acting under statutory powers, application was made to the Court to appoint a guardian *ad litem*. The Court made the order, holding that the same reason applied in the case of a petition as where a suit had been instituted: *Greaves v. Great Northern Ry.* (1854), 2 Eq. R. 516.

(4) Certain freehold land belonging to B., a lunatic, being required by the Corporation of L., the committee agreed to sell the land, and the purchase-money was paid into court under the Lands Clauses Act. The committee then petitioned for leave to convey to the corporation and to have the purchase-money carried over to the credit of the lunacy and invested:—*Held*, that the next of kin of the lunatic were proper parties to the application, and that their costs, as well as those of the heir at law, must be paid by the corporation: *In re Briscoe* (1864), 2 De G. J. & S. 249.

O. Public bodies whose funds, including the purchase-money of lands taken, are administered under a scheme of the Charity Commissioners.

The appearance of such bodies, since they are bound by the scheme, is unnecessary. Where, however, the title to the lands taken is still in the Official Trustee of Charity Lands he should be served.

Illustrations.

(1) Land belonging to S., in right of a prebend, was taken by a local authority and the purchase-money paid into court. The estate of S. afterwards became vested in the petitioners, the Ecclesiastical Commissioners. S., who had at first been made a co-petitioner, was afterwards made a respondent, as it was thought right that he should appear separately:—

Held, that S. was not entitled to his costs of appearance, not on the ground that he had been wrongly served, but because no additional expense would have been incurred if he had joined in the petition: *In re St. Margaret's, Leicester (Prebend)* (1864), 10 L. T. 221; followed in next case but one.

(2) The Metropolitan Board of Works took under statutory powers the lands of a charity and paid the purchase-money into court. The trustees then petitioned that the fund might be invested in Consols, and when so invested carried over to the account of the Official Trustee of Charitable Funds, and that the dividends might be paid to the treasurer for the time being of the charity. The title to the land sold had been approved by the purchasers, but the conveyance to the Board of Works had not yet been executed, hence the legal estate remained vested in the Official Trustee of Charity Lands under a scheme. The Official Trustees of Charity Lands and Charitable Funds were served with the petition:—*Held*, that the Board of Works were liable for the costs of such service: *In re Stafford's Charity* (1888), 57 L. T. 846.

(3) A petition was presented for the transfer of funds (which had been paid into court by various public bodies in respect of charity lands in the City of London which had been taken under compulsory powers) into the name of the Official Trustee of Charitable Funds. Under statutory powers the Charity Commissioners had made a scheme for the administration of the funds, and such scheme was binding on the various bodies in whose names respectively the funds were standing. The petition had been served on the various bodies, thirty-two in number. Some of the sums in court amounted to less than 1,000*l.*:—*Held* that, the various bodies being bound by the scheme, service on them was unnecessary, and on the authority of *In re St. Margaret's, Leicester (Prebend)* (*supra*) these costs must be disallowed: *In re St. Alban's, Wood Street* (1891), 66 L. T. 51.

P. Glebe land and ecclesiastical property.

- (a) Where glebe land is taken, the vicar is not competent to deal with the purchase-money.

Illustration.

A railway took part of the glebe lands of a vicarage and paid the purchase-money into court. An order was made for the payment of the dividends of the fund to the vicar for the time being. Afterwards the vicar, with the consent of the bishop and the patron, executed a deed under 1 & 2 Vict. c. 106 and apportioned the money between two chapels-of-ease in equal parts. Upon a petition for the sanction of the Court thereto:—*Held* that the Court could not give its sanction, inasmuch as the fund represented the glebe lands, to which the Act referred to did not apply; and the company were allowed their costs: *Ex parte Kidderminster (Vicar)* (1859), 7 W. R. 482.

- (b) When it is proposed to deal with the purchase-money of glebe land which has been paid into court as capital moneys under the Settled Land Act, the patron of the living must be served with the petition.

Illustration.

On an application by the vicar of C. for the purpose of having the purchase-money of glebe land which had been paid into court dealt with as capital money under the Settled Land Act, 1882, Stirling, J., directed the case to stand over that the patron might be

represented and, if necessary, heard : *Ex parte Castle Bytham (Vicar)*, *Ex parte Midland Ry.*, [1895] 1 Ch. 348.

- (c) If the consent of the Church (or Ecclesiastical) Commissioners is essential, they should not appear, but their consent should be obtained in writing.

Illustration.

In a case where the consent of the Church Estates Commissioners was essential, it was *held* that this consent should have been obtained in writing and that service upon the Commissioners was unnecessary : *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14.

- (d) If glebe land is taken and the application is for reinvestment in building a vicarage-house to which the governors of Queen Anne's Bounty are contributing, the promoters are not liable for the costs of appearance by the governors.

Illustration.

Part of glebe land having been taken by a railway company and the purchase-money paid into court, a petition was presented for the reinvestment of the money in the building of a vicarage-house, towards which the governors of Queen Anne's Bounty were contributing. The company was *held* to be not liable for the costs of serving the governors or of appearance by them. These costs were ordered to be paid by the petitioner : *In re Whitfield (Incumbent)* (1861), 1 J. & H. 610.

q. Freemen.

If land of a municipal corporation is taken, the freemen must be represented before the purchase-money is finally dealt with.

Illustration.

Where land belonging to a municipal corporation was taken by a railway company and the purchase-money paid into the bank, the Court would not allow any steps to be taken with respect to the final application of such purchase-money until it was satisfied that the freemen were represented : *Ex parte Lincoln Corporation*, *In re Great Northern Ry.* (1852), 6 Rail. Cas. 738.

r. Official solicitor.

Where, owing to delay in dealing with the money in court, it is necessary to serve the official solicitor with the petition for payment out, the promoters will not have to bear the costs.

Illustration.

A fund representing purchase-money under the Lands Clauses Act had not been dealt with for fifteen years ; with accumulated dividends the fund exceeded 500*l*. On a petition for payment out service on the official solicitor was necessary under the Chancery Funds

Rules :—*Held*, (1) that the costs of the official solicitor were not payable by the company ; (2) that as these costs had become payable through the neglect of the tenant for life, they were properly payable out of that part of the fund which went to his estate : *In re Clarke's Estate* (1882), 21 Ch. D. 776.

s. Land subject to an administration action.

- (a) Upon an application to transfer the purchase-money to the credit of an action or to invest it to the credit of the action, such actions not being adverse litigation, the promoters must pay the costs of all parties properly served, and in some cases the costs of their appearance have also been ordered to be borne by the promoters.

Illustrations.

(1) Where land belonging to certain devisees in trust was taken by a railway company, the costs of the petitioner and the other parties in the cause (being properly served) were ordered to be paid by the company : *Dinning v. Henderson* (1848), 2 De G. & Sm. 485.

(2) Parties to certain pending suits petitioned to have a sum of money which had been paid into court by a railway company invested in trust in the suits, and also to have the dividends invested and accumulated. Several of the parties to the suit appeared by their counsel to consent :—*Held*, that the railway company was bound to pay the costs of all : *In re Hull and Selby Ry.* (1848), 5 Rail. Cas. 458.

(3) Certain lands, which were the subject of an administration action, were taken by a railway company. Among the parties interested were infants and married women. A reference was therefore directed to the master to ascertain what course was most for the benefit of those who were under disability, and the company was ordered to pay all the costs, charges and expenses of the petition and reference : *Picard v. Mitchell* (1850), 12 Beav. 486.

(4) Part of a settled estate was taken by a railway company and the purchase-money paid into court. The tenant for life died, and a suit was instituted for the administration of the estate, and a petition was presented by one of the parties on the record to have the fund carried over to the credit of the cause. The petition was served on the trustees for sale and on all the other parties, and several appeared. It was contended that the money might have been paid out to the trustees after the death of the tenant for life ; but Turner, V.-C., *held* that the costs could not be separated, and that the costs of all parties served must be paid by the company according to the Act : *Patten v. Gatty* (1852), 1 W. R. 219, *n*.

(5) Land which was the subject of an administration suit was taken by a railway company and the money paid into court. The parties to the suit were served with a petition by the tenant for life for reinvestment of the money in other land :—*Held*, that the parties had been rightly served, but that they ought not to appear or interfere in any way in the petition. The costs of serving the reversioner and the trustees were ordered to be paid by the company, but the rest of the costs were directed to be paid out of the fund : *Wilson v. Foster, In re Lancashire and Yorkshire Ry.* (1859), 28 L. J. Ch. 410.

(6) In 1843 a suit was begun by the trustees of C.'s will for the administration of his estate. In 1846 a railway company took possession of a part of the testator's land, and a reference was afterwards directed to a master as to whether it was for the benefit of those

interested who were either infants or married women that the land should be sold. Several orders had to be obtained from the Court. Upon an application to transfer the purchase-money to the credit of the cause:—*Held*, that the company was bound to pay the costs of all parties of obtaining the several orders in the suit, including all reasonable charges and expenses incident thereto, and of the application to transfer the fund into the suit: *Henniker v. Chafy* (1860), 28 Beav. 621; see Illustration (10), *infra*.

(7) Property the subject of a suit being damaged by the works of a company, the compensation assessed was paid into court. Upon a petition to transfer the fund to the credit of the cause and to accumulate the dividends, the parties to the suit were served:—*Held* that, under the Lands Clauses Act, the company was bound to pay only the costs of the petitioner and the costs of serving the respondents, but not those of their appearance: *Sidney v. Wilmer, In re Clay Cross Waterworks* (1862), 31 Beav. 338; see Illustration (11), *infra*.

(8) “But persons whose estates are taken by railway companies or other such bodies, under compulsory powers given to them for their own benefit, or the benefit of the parties whom they represent, are entitled to deal with their estates to suit their own convenience, not that of the company; and if it happens in the course of such dealing that a suit is instituted, not being litigation properly so called, but merely administration or some similar proceeding under the direction of the Court, it will follow as of course that the company (except in cases of vexatious or wanton proceedings, of which the Court would take special notice, and with which it would know how to deal when they came before it) would have to pay the costs of all necessary parties occasioned, not by any particular adverse claims, but by the ordinary course of dealing with property. I desire, however, to add that in future I trust that in such a suit as this the plaintiff alone will move where the object is merely to get money transferred into court or carried over to the credit of a particular cause. The case is, of course, different where it is desired that money should be paid out of court, but that I have not got to deal with here”: *per* Lord Hatherley, in *Eden v. Thompson* (1864), 2 H. & M. at p. 9.

(9) A petition presented in an administration suit for the investment of purchase-money paid into court by a railway company for land acquired, and for the payment of the dividends to the receiver in the cause, was served upon all the parties to the suit, including some remaindermen who had been served with a copy of the decree and had obtained liberty to attend the proceedings, and they all appeared at the hearing of the petition:—*Held*, that the company was bound to pay all the costs: *Paterson v. Paterson* (1864), 3 N. R. 657.

(10) A petition, presented by a tenant for life, for payment of the income of a fund paid into court under the Lands Clauses Act, and which fund was the subject of an administration suit, was served on the trustees:—*Held*, that the company must pay the trustees' costs: *Henniker v. Chafy* (1865), 35 Beav. 124.

(11) Where a railway company takes land which is the subject-matter of a suit, and in consequence of such suit it is necessary to serve the parties to the suit, the railway company must pay all the expenses occasioned thereby, including the costs of appearance: *Haynes v. Barton* (1866), L. R. 1 Eq. 422; *Sidney v. Wilmer* (*supra*) not followed.

(12) A public body took land under statutory powers. The land was the subject of a settlement. The purchase-money was paid into court. After it had been declared in an action, in which the trustee of the settlement was a defendant, who was beneficially entitled, a petition was presented to transfer the fund to the credit of the action. The trustee was served with the petition and appeared:—*Held*, that the trustee was entitled to appear and to have the costs from the public body: *In re English's Settlement* (1883), 39 Ch. D. 556.

- (b) When there is an administration action and a petition by a person entitled to part of the money in court, the costs of the appearance of others entitled will not be given against the promoters, as they should have been joined in the petition.

Illustrations.

(1) Land the subject of an administration suit was taken by a railway company and the value paid into court. A petition was presented by one of the persons interested praying that a tenth part of the fund might be transferred to the credit of the action. The petition was served upon the trustees of the land and upon the other persons entitled to the fund :—*Held*, that the petitioner ought to have applied to the other beneficiaries to join in the petition, and as there was no reason why they should not have joined, the railway company were ordered to pay only the costs of the petitioner and of the trustees : *Melling v. Bird* (1853), 22 L. J. Ch. 599.

(2) Land which was subject to a charge under a settlement was taken by a railway company and the purchase-money paid into court. A decree had been made in a suit directing a sale or mortgage of a sufficient part of the property to satisfy the charge. The tenant for life of the property presented a petition for the payment of the purchase-money to the credit of the suit and its application towards payment of the charge ; and the petition was served upon the persons interested in the charge, who appeared ; —*Held*, that the company must pay the costs of the petitioner, but not of the other parties to the petition who had appeared : *In re Picton's Estate* (1855), 3 W. R. 327 ; *Melling v. Bird* (*supra*) followed.

T. Trustees of marriage settlement.

Where the land is so dealt with that service of the petition on the trustees of a marriage settlement is necessary, the promoters must pay their costs.

Illustration.

Land which was subject to a settlement was taken by a railway company and the purchase-money paid into court. The tenant for life appointed by will under powers in the settlement, and on her death her appointees petitioned for payment out. Under the terms of the appointment the petition had to be served on certain trustees of some of the appointees :—*Held*, that as the company had taken the land subject to the possibility of its being subsequently settled, they must pay the costs (not being costs of adverse litigation) of all parties : *In re Brooshoof's Settlement* (1889), 42 Ch. D. 250.

V. What costs are payable under the section.

Costs, including all reasonable charges and expenses incident thereto, of the following matters, viz. :—

The costs of purchasing or taking of the lands or which shall have been incurred in consequence thereof, other than such costs as are otherwise provided for in the Act ;

The costs of the investment of the purchase-moneys in Government or real securities ;

The costs of reinvestment in the purchase of other lands ; but the costs of one application only for reinvestment in land will be allowed,

unless it appear to the Court that it is for the benefit of the parties interested in the moneys that the same should be invested in the purchase of lands in different sums and at different times.

Costs of obtaining :—

Proper orders for any of the foregoing purposes ;

Orders for the payment of dividends and interest of the securities in which such moneys shall be invested ;

Orders for the payment out of court or transfer of the principal of such moneys or of the securities in which they are invested ;

And all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants.

A. (a) The costs of purchasing and taking lands which are otherwise provided for in the Act, and therefore cannot be given under sect. 80, are those which are provided for in sects. 34, 51, and 82. They include :—

Costs of hearing before arbitrators or an umpire and incidental to the arbitration ;

Costs of hearing before justices or a jury ;

Costs of valuation by surveyor appointed by justices ;

Costs of the conveyance, &c.

Illustrations.

(1) A railway company desiring to take possession of certain land gave the owners a bond and deposited the estimated value of the land. They afterwards paid the amount found by a jury to be the value, and obtained a conveyance from the owners and petitioned for the return of the sum deposited :—*Held*, that the company were entitled to have this repaid, and that the owners had no lien upon it for their costs of ascertaining the value of the land and of an action they had had to bring : *Ex parte Great Northern Ry.* (1848), 5. Rail. Cas. 269. "The Act directs the promoters to pay the expense of the jury in certain cases. It directs the promoters to pay the costs of the conveyance, and it directs the mode in which those costs are to be ascertained and paid, and the remedy for those costs if they are not paid. . . . Then comes the 80th section, which gives the Court discretion, but it is a discretion as to costs only applicable to cases other than those in which the costs are otherwise provided for. Now the costs are otherwise provided for both as to the expense of the jury process and as to the expense of the conveyance. It is impossible, therefore, to bring this within the 80th section. Then, if it is not within the 80th section, there is no provision in the Act giving the Court discretion and power as to costs" : *per* Lord Cottenham, C., at p. 272 ; and see *Ex parte Buck*, p. 507, *post*.

(2) The N. Railway Co. being desirous of getting possession of certain land belonging to W., gave him notice to treat, and took possession under sect. 85 of the Lands Clauses Act and paid the sum determined by valuation (1,544*l.*) into court and executed the bond required by sect. 85. The compensation for the land taken was afterwards fixed at 3,400*l.*, and this sum was paid by the company. Upon petition by the company for repayment of the 1,544*l.* :—*Held*, that they were entitled to have this sum repaid under sect. 85 without any deduction for the respondent's costs : *Ex parte Neath and*

Brecon Ry. (1874), L. R. 9 Ch. 263. Sect. 80 only authorises the Court to make an order on the company to pay costs generally, not out of any particular fund: *per Mellish*, L.J., at p. 265, *ib.*

- (b) When a special Act specifically incorporates sect. 80, but not sect. 34, the Court will construe the words "all reasonable charges and expenses" in sect. 80 as including the costs of the arbitration, although the special Act may have given power to the arbitrator to award the costs of the arbitration.

Illustration.

By the Epping Forest Act, 1878, the Corporation of London, as conservators of the forest, were authorised and required to purchase certain lands called "the Green Lands," the value of which was to be determined by arbitration. The special Act incorporated sects. 69—80 of the Lands Clauses Act, but not sect. 34:—*Held*, that the words in sect. 80, "including therein all reasonable charges and expenses incident thereto," were wide enough to include the costs of the arbitration and to enable the Court to order their payment, notwithstanding the power to award costs given to the arbitrator by the special Act: *In re Pardoe's Account* [1882] W. N. 33.

- (c) If after taking possession under sect. 85, the promoters abandon the undertaking, the costs of ascertaining the compensation come within the section, if the land is "taken" within the meaning of the Act.

Illustration.

The S. Railway Co. gave notice to treat in respect of certain land, but, nothing being done, entered under sect. 85 of the Lands Clauses Act, and paid the value as determined by a surveyor into court and gave a bond. By a subsequent Act the company were authorised to abandon this part of their undertaking, but the abandonment was not to prejudice the right of landowners to compensation for damage to land by reason of entry or temporary occupation, and the Act provided that this compensation should be determined under the Lands Clauses Act. The owners agreed with the company, fixing the compensation at a sum which was not to include costs to which the owners might be entitled under the company's Acts:—*Held*, that the land had been taken within the meaning of sect. 80 of the Lands Clauses Act, and the company were liable to pay the costs of ascertaining the compensation and of preparing the agreement: *Charlton v. Rolleston* (1883), 28 Ch. D. 237.

- (d) If promoters wish to take possession under sect. 85 and proceedings are taken to summon a jury, but afterwards the price is settled by agreement, the costs of the proceedings to summon a jury are within sect. 80.

Illustration.

Land was taken by a railway. The company wishing to take possession, paid a sum of money into the bank under sect. 85, and proceedings were taken to summon a jury. The price of the land was then fixed by agreement, and the company agreed to pay all such costs and expenses as they were liable to pay under the Lands Clauses Act or otherwise:—*Held*, that they were liable to pay the costs of the vendors in the proceedings to summon a jury: *Ex parte Morris* (1871), L. R. 12 Eq. 418.

- (e) If a company takes possession of land before payment into court the costs occasioned by taking the land must be paid (under sect. 80) by the promoters, but not the costs of taking possession.

Illustration.

A railway company required certain land and wrongfully took possession before paying the value of the land into court :—*Held*, that the costs “occasioned by taking the land, and which never would have been necessary if it had not been taken, must be paid by the company. With regard to the costs occasioned by the taking possession, that was a wrongful act, and although *à fortiori* it seemed just to make them pay them, the Court had no jurisdiction to do so, the proceedings occasioning them having occurred before the payment into court, although that question might be considered in the suit” : *per* Kindersley, V.-C., in *Haynes v. Barton* (1861), 9 W. R. 777.

- (f) If the special Act provides for exceptional costs necessarily incurred they come within sect. 80.

Illustration.

By an Act of 1836 it was provided that the B. and E. Railway might take the vicarage-house of C. and the grounds belonging to it ; and the compensation payable should “on petition to the Court of Exchequer by the vicar and patron for the time being of the vicarage, and with the consent of the ordinary for the time being of the diocese,” be laid out in the purchase of other lands to be settled to like uses :—*Held*, that the bishop was entitled to be paid by the company, not only the costs of his attendance in the master’s office, but also of his appearances on the petitions to the Court for a reference and confirmation of the master’s report : *Ex parte Creech St. Michael (Vicar)* (1852), 21 L. J. Ch. 677.

- (g) If a disentailing deed is necessary the costs thereof are within sect. 80.

Illustration.

Land which was limited to the use of N. B. for life with remainder to his first son in tail being taken by a railway company and the purchase-money paid into court, it became necessary for a disentailing assurance to be executed by the tenant in tail and the protector of the settlement :—*Held*, that the costs thereof were within the special Act (the terms of which were practically identical with sect. 80) and payable by the company : *Brooking v. South Devon Ry.* (1859), 2 Giff. 31. But in *Ex parte Allen* (1881), 7 L. R. Ir. 124, the Court refused to direct the costs of the disentailing deed to be paid by the body which had acquired the land, but left the question to the taxing master.

- (h) If a contract is entered into for taking lands of a lunatic under sect. 80 the promoters will be ordered to pay the costs of reference to the master to inquire whether the contract is proper and beneficial as to the lunatic.

Illustration.

The petitioners had entered into a contract for the sale of certain lands belonging to T., a lunatic, to a railway company. The Lord Chancellor directed an inquiry as to whether the contract was proper and beneficial as to the lunatic, and, the master reporting in favour of the contract, an order was made upon petition that (*inter alia*) the costs

of and incidental to the conveyance and investigation, deduction and verification of title, and of the reference and the petition, should be paid (after taxation) to the petitioners by the railway company : *In re Taylor and York and North Midland Ry.* (1849), 1 Mac. & G. 210.

- (k) The costs of a lessor in apportioning rents under sect. 119 are within sect. 80 as costs incurred in consequence of the taking of the lands.

Illustrations.

(1) A railway company agreed to purchase lands, and the landowner incurred expenses in apportioning the rents under sect. 119. The costs occasioned by the apportionment were *held* not to be costs of the conveyance or within the 82nd section, and were disallowed on taxation : *Ex parte Buck, In re Hampstead Junction Ry.* (1863), 33 L. J. Ch. 79.

(2) A railway company took possession of part of lands subject to leases, paying a deposit into court. The landowner petitioned that costs incurred by him about the apportionment of the rents might be paid out of the deposit in court. It was *held* that such payment ought to be made under sect. 80 of the Lands Clauses Act : *Ex parte Flower, In re London, Brighton and South Coast Ry.* (1866), L. R. 1 Ch. 599.

- (l) Exceptional costs may have to be borne by the promoters.

Illustrations.

(1) A railway company had paid into court the purchase-money of settled lands taken by them under statutory powers. The vendor was transferee of a deceased mortgagee whose heir at law could not be found :—*Held*, the company must pay the costs of a petition for appointment of a person to convey in place of the heir at law : *In re Nash's Estate* (1855), 4 W. R. 111.

(2) Guardians purchased settled copyhold lands and also the lord's interest under 5 & 6 Will. IV. c. 69, and paid all the purchase-money into court. On a petition by the tenant for life, who was also the lord, for investment and payment to him of the dividends :—*Held*, that the guardians were bound to pay the costs of the purchase and of the enfranchisement : *In re Maryon Wilson's Estate* (1863), 8 L. T. 413.

B. Costs of the investment of the purchase-money in Government or real securities.

This part of the section applies to the investment in Government securities and the interim investment on mortgage. The liability of the promoters to pay the costs of permanent reinvestment remains.

NOTE.—Power to award costs may be given by the special Act if not by sect. 80.

Illustrations.

(1) Where by a railway Act it was enacted that the money paid into court by the company for lands purchased by them should, by order made upon the petition of the party interested, be invested if the purchase of lands to be settled to the like uses and in the meantime should, by an order similarly obtained, be invested in the funds, and the Act further enacted that the Court might order the expenses of such purchases and of the investment of the purchase-money in land "or other disposition of the same"

to be paid by the company :—*Held*, that the company were liable to pay the expenses of the interim investment of the money in the funds : *Ex parte Onslow, In re London and Southampton Ry.* (1835), 1 Y. & C. 553.

(2) Where, under a special Act, a company is liable to pay the expenses of “all purchases” to be made under the Act, this will include the expenses of investing the money in the funds before it is laid out in lands to be settled to the like uses as the land originally taken by the company : *Ex parte Durham (Bishop)* (1839), 3 Y. & C. 690 ; same point, *Ex parte Ely (Bishop)* (1839), 3 Y. & C. 691, *n*.

(3) The Secretary of State took lands under the Defence Act, 1842, and paid the purchase-money into court, before the passing of the Act 23 & 24 Vict. c. 112. A petition for investment in Consols was presented :—*Held*, that the provisions of the latter Act applied, and that the Secretary of State must pay the costs ; but it was directed that future applications in respect of money paid in under these Acts should be made in chambers : *In re Maynard's Trusts, In re The Defence of the Realm Act, 1842* (1861), 7 Jur. (N.S.) 232.

- (a) If the investment be in stock it must be made without deduction of brokerage, which must be paid by the promoters.

Illustrations.

(1) Under an Act enabling the Trinity House to purchase property, and in certain cases to pay the purchase-money into court to be laid out in stock for the benefit of the parties entitled, providing that the “costs of the investment of the purchase-money” shall be paid by the corporation, the broker's commission on the purchase of stock is a part of the costs of investment to be borne by the corporation : *Ex parte Trinity House (Corporation)* (1843), 3 Hare, 95.

(2) Certain lands subject to a marriage settlement were taken by the K. and W. Railway Co. and the purchase-money was paid into court. Upon a petition for the investment of this money in stock, the company was ordered to pay the broker's commission upon the purchase of the stock. In such a case the whole of the money should be invested without deducting the broker's charges, and the Paymaster-General should be recouped : *In re Kendal and Westmoreland Ry., Ex parte Braithwaite* (1853), 1 Sm. & G. Appx. xv.

(3) In *Ex parte Harborough* (1853), 17 Jur. 1045, Kindersley, V.-C., ordered the money to be invested after deducting the brokerage, and the company was directed to pay the brokerage, with the other costs, to the tenant for life.

(4) Railway purchase-money was invested in 1844 and trustees of a settlement petitioned for payment of it to mortgagees on the property, and that the company might pay brokerage both of investment and selling out, as well as the costs of the tenant for life and mortgagees appearing separately :—*Held*, that the investment being made before the rule as to deducting brokerage made no difference, but it would be payable by the company except that in this case there had been no taxation of the costs of investment, and therefore the company were liable only to brokerage on selling out, and mortgagees but not tenants for life had a right to appear separately and to have their costs : *In re Legh's Settled Estate* (1853), 2 W. R. 109.

(5) Upon a petition by a tenant for life for the investment of money paid into court by a railway company and for investment of the dividends, the investment was directed to be made without deduction for brokerage, which was to be paid by the petitioner and allowed him in his costs against the company : *In re Wilson* (1853), 1 W. R. 504.

NOTE.—As to investment in stock under special Acts.

Illustrations to Note.

(1) The Court has jurisdiction, under sects. 84 and 89 of the General Metropolitan Paving Act, to order payment of the costs of an interim investment in Consols, including the costs of a petition for the purpose, of purchase-money in land taken by a board of works under the powers of the Act: *In re Mercer* (1877), 7 Ch. D. 184.

(2) The Settled Land Act, 1882, s. 32, provides that where, under any special Act, money is in court liable to be laid out in the purchase of land to be settled, that money may be invested as if the mode of investment were authorised by the special Act:—*Held*, that the costs of an interim investment in debenture stock under a special Act (which did not authorise such an investment) must be paid by them in like manner as if the mode of investment were authorised by the special Act: *In re Hanbury* (1883), 52 L. J. Ch. 687.

- (b) The term Government or real securities includes an investment in railway stock and India stock, and money in court under the Act may now be invested in any of the securities in which “cash under the control of the Court” may be invested.

Illustrations.

(1) Purchase-money of lands sold under the Settled Estates Act is money under the control of the Court, and may be invested as such: *In re Taddy's Settled Estates* (1873), L. R. 16 Eq. 532; *In re Boyd's Settled Estates* (1873), 21 W. R. 667, not followed.

(2) Purchase-money paid into court in respect of land taken by a railway company under the Lands Clauses Act is “cash under the control of the Court,” and accordingly the Court has power to direct the investment thereof in East India $\frac{1}{2}$ per cent. stock: *In re Fryer's Settlement* (1875), L. R. 20 Eq. 468.

(3) Money paid into court under the Lands Clauses Act was *held* to be money under the control of the Court within the meaning of the first General Order of 1861, and could accordingly be invested in East India stock: *In re Foy's Trusts* (1875), 23 W. R. 744.

(4) Although India stock is not one of the securities mentioned in the statute 9 & 10 Vict. c. 20, s. 4, or in the Lands Clauses Act, s. 70, the Court will allow Parliamentary deposits to be invested in that stock: *In re Southwold Ry.* (1876), 1 Ch. D. 697; *Ex parte Great Northern Ry.* (1870), L. R. 9 Eq. 274, not followed.

(5) Money paid into court under the Lands Clauses Act is “cash under the control of the Court,” and may be invested in any of the securities sanctioned by the Court, *e.g.*, East India $3\frac{1}{2}$ per cent. stock: *Ex parte St. John Baptist College, Oxford*, *In re Metropolitan and District Railways Act* (1882), 22 Ch. D. 93. This case overruled *In re Boyd's Settled Estates* (1873), 21 W. R. 667; which was followed in *Ex parte St. Mary Wotton (Vicar)* (1881), 18 Ch. D. 646, and *Ex parte Kirsmeaton (Rector)* (1882), 20 Ch. D. 203.

(6) Money paid into court under a private Act, and invested in Exchequer bills, is “cash under the control of the Court” within the meaning of 23 & 24 Vict. c. 38 and the General Order of February 1st, 1861; and may be invested in any of the securities sanctioned by the Court, although such private Act directs the investment to be in Exchequer bills: *Jackson v. Tyas* (1883), 52 L. J. Ch. 830; see now R. S. C. Ord. XXII. r. 17.

(7) The purchase-money of land paid into court under the Lands Clauses Act is “cash under the control of the Court,” and may be invested as such: *In re Brown* (1890), 59 L. J. Ch. 530.

(8) Where an interim investment of purchase-money paid into court under the Lands Clauses Act, 1845, is made upon railway securities allowed by the R. S. C. Ord. XXII.

rule 17, for the investment of cash under the control of the Court, the promoters of the undertaking are, by virtue of sect. 80 of the Lands Clauses Act, liable for the costs of the investment, although the terms of the section apply only to the costs of investment "in Government or real securities": *In re Gaselee* (1901), 70 L. J. Ch. 441.

(c) The official broker must be employed.

Brokerage.

Illustration.

A railway company presented a petition that the Parliamentary deposit standing to the credit of "*Ex parte* the undertaking of the Bolton Railway Company" might be invested in bank annuities by certain private stockbrokers, thereby saving the company 20*l.*:—*Held*, by Bacon, V.-C., that this could not be permitted, and that his own order (made, but not drawn up) in *In re West Riding and Lancashire Rys.* (1876), 24 W. R. 357; W. N. 48 (see also W. N. 80, where the order was corrected) could not be sustained and that the investment must be carried out by the Paymaster-General's broker: *Ex parte Bolton Junction Ry.* (1876), 24 W. R. 451.

(d) After investment in Government securities a second interim investment on mortgage may be allowed, the costs of which must be paid by the promoters, who may still remain liable to pay the costs of permanent investment. But such investment on mortgage has in certain cases been ordered to be treated as a permanent reinvestment.

Illustrations.

(1) Land which was subject to the trusts of a will was taken by a railway company and the purchase-money paid into court. The trustees and beneficiaries petitioned for the investment of the fund in a mortgage of real estate. The Court made the order for the proposed investment, and directed the company to pay the costs of all parties appearing: *Reading v. Hamilton* (1862), 5 L. T. 628.

(2) Where the Court deemed a proposed second reinvestment of purchase-money paid by a railway company to be for the benefit of the parties interested, the company was ordered to pay the costs of such second reinvestment: *In re Hereford, Hay and Brecon Ry.* (1864), 13 W. R. 134.

(3) Compensation money was invested in Consols, and an application was afterwards made to reinvest it on the security of a mortgage:—*Held*, that the company must pay the costs, but that, with regard to future costs, it must be considered a permanent security: *In re Lomax* (1864), 34 Beav. 294.

(4) The Corporation of L., under statutory powers, took a house and paid the purchase-money into court under the provisions of the Lands Clauses Act, and the money was forthwith invested in Consols. A petition was afterwards presented for the investment upon the security of freehold land of nearly twice the value, and the petition asked for costs against the company. This application was granted: *In re Wilkinson* (1868), 18 L. T. 17.

(5) Settled land having been taken by a corporation and the purchase-money paid into court, the trustees petitioned for the interim investment of the purchase-money upon mortgage of freeholds. The Court approved the proposed investment, subject to an inquiry as to the sufficiency of the security, and ordered the corporation to pay the costs: *In re Smith's Trust Estate* (1870), L. R. 9 Eq. 178.

(6) A railway took lands and paid the purchase-money into court. The money was first invested in reduced annuities, and it was afterwards sought to make an interim investment in real securities :—*Held*, that the railway ought to pay the costs of this reinvestment, but not of any later one : *In re Flemon's Trusts* (1870), L. R. 10 Eq. 612.

(7) The purchase-money of a freehold messuage taken by the Corporation of London was paid into court and afterwards invested in reduced annuities. Upon petition by the trustees :—*Held*, that the petitioners were entitled to the reinvestment in land, and the costs must be borne by the Corporation : *In re Dodd's Estate* (1871), 19 W. R. 741.

(8) The trustees of B.'s will petitioned the Court for its sanction to the investment upon mortgage security of purchase-money paid into court in respect of property subject to the trusts of the will, taken by a railway company. The money had been invested in Consols :—*Held*, by Lord Selborne, C., that this could not be treated as a permanent investment. The Court had power under sects. 70 and 80 of the Lands Clauses Act to order the company to pay the costs of more than one interim investment, and the company must therefore pay the costs of the application and of the proposed investment, without any condition as to costs of any future permanent investment : *In re Blyth's Trusts* (1873), L. R. 16 Eq. 468.

(9) Upon a petition by a tenant for life of property taken by a railway company praying for the investment of the purchase-money, the company asked for a direction to be included in the order that they were not to be compellable to pay the costs of any future investment in land. Malins, V.-C., declined to include any such direction, following *In re Blyth, supra* : *In re Stewart* (1874), L. R. 18 Eq. 278.

(10) Upon a petition that the purchase-money of land taken might be transferred to the Official Trustee of Charity Lands to be applied in part payment of the purchase-money of lands recently purchased by a charity, and that the costs of the reinvestment and the petition might be paid by those who had taken the land, the transfer was ordered but the costs disallowed : *In re Bishop Monk's Horfield Trusts* (1881), 29 W. R. 462.

(11) In 1879 a railway company took land forming part of the glebe of the rectory of G. The compensation money was paid into court and was ordered to be invested in reduced 3 per cent. annuities, the costs of this application for investment being paid by the company. In 1883 the incumbent applied that the annuities should be sold and the proceeds reinvested on mortgage, the company again paying the costs, and it was ordered that for the purposes of the cost of any future application such reinvestment should be deemed a permanent reinvestment of the proceeds of sale. Afterwards it was desired to apply the amount secured by the mortgage under the provisions of the New Parishes Act, and the Ecclesiastical Commissioners petitioned for a declaration that they were entitled to the moneys and that the mortgagor might be at liberty to pay them over :—*Held*, that the company could not be ordered to pay the costs of this application : *In re Gedling (Rector)* (1885), 53 L. T. 244.

- (e) If the Government security is redeemed the promoters will be ordered to pay the costs of reinvestment, including brokerage, in Government securities or railway stock, but not costs of reinvestment of the money in excess of the original purchase-money if the redemption money exceeds that in amount.

Illustration.

In 1884 the purchase-money of certain land belonging to a lunatic was paid into court by a railway company (the purchasers) and afterwards invested, by order, in 3 per cent.

Consols. In 1888, upon the conversion of the National Debt, the committee declined to consent to the conversion of the Consols into New Consols, whereupon the Government redeemed and paid the redemption money into court. Upon petition that the money might be reinvested in preference shares of a railway company :—*Held*, that the company must pay the costs of the reinvestment save so far as the cost of investment might have been increased by the fact of the redemption money exceeding the original purchase-money in amount : *In re Brown* (1890), 63 L. T. 131.

c. Costs of reinvestment in other lands, &c.

- (a) The term “lands” includes tenements and hereditaments of any tenure (*see* sect. 3, *ante*), but the purchase-money of freehold lands can only be invested in copyholds if the master reports that such investment is fit and proper, and even where such investment is permitted the promoters are not liable to pay the fines on admission to such copyholds.

Illustrations.

(1) Freeholds which were subject to a trust for sale were taken by a railway company, and the purchase-money was paid into court. The tenant for life petitioned the Court to sanction this investment of the money in freehold and copyhold lands and for the payment out of such money of the fines and fees in respect of the copyhold part. Upon the report of a master that the proposed investment was a proper one, the Court sanctioned the proposed investment. *In re Cann's Estate* (1849), 15 Jur. 3.

(2) Certain lands being taken by a railway company, it became necessary to reinvest the purchase-money in other lands, and only lands of copyhold tenure were, in the circumstances, procurable :—*Held*, that the fines on admission to such copyholds were not payable by the company under the words “costs, &c., consequent thereon” : *Ex parte Sawston (Vicar)*, *In re Eastern Counties Ry.* (1858), 6 W. R. 492.

- (b) When the purchase-moneys are invested otherwise than in lands, but for one or other of the purposes authorised in sect. 69, *e.g.*, the discharge of incumbrances, the promoters *generally* will only have to pay the cost of one petition and subsequent order. (See, however, Judicature Act, 1890, sect. 5 of which gives a wide discretion as to costs in the Supreme Court.)

- (i.) Payment of incumbrances on other land settled to like uses (*see* p. 517, *post*).

Illustrations.

(1) Where under the provisions of a railway Act lands are purchased by the company from corporations, tenants for life, &c., the costs of an application to the Court to have the purchase-money applied in the discharge of incumbrances will be directed to be paid by the company, although the Act only makes an express provision for such costs in cases where the money is to be laid out in the purchase of lands to be settled to the like uses : *Ex parte Trafford*, *In re Liverpool and Manchester Ry.* (1837), 2 Y. & C. 522 ; 47 R. R. 451 ; but *see* Illustration (8), *post*.

(2) Land valued at 739*l.* was taken by a railway company and the money paid into court. Upon the petition of the tenant for life of the estate, which included the acquired land, that this money might be applied towards the reduction of a mortgage on the estate, and that the company should pay the costs of such application of the money :—*Held*, that the payment of such costs was not within the terms of the company's special Act : *Ex parte Hardwicke (Earl), In re Eastern Counties Ry.* (1848), 17 L. J. Ch. 422.

(3) Settled land was taken by a railway company and the purchase-money paid into court in 1850. In 1852 a contract was entered into for the investment of the money in land, but shortly afterwards a petition was presented for the investment of the purchase-money in Consols. Thereafter a petition was presented for the completion of the purchase of the land :—*Held*, that the company must pay the costs of both petitions : *In re Liverpool, &c., Ry.* (1853), 17 Beav. 392.

(4) Under sect. 80 of the Lands Clauses Act, the promoters are not liable to pay the costs incurred by the application of their purchase-money in paying off an incumbrance on other parts of the estate of the owner : *In re Manchester, Sheffield, and Lincolnshire Ry., Ex parte The Sheffield Corporation* (1855), 21 Beav. 162 ; see Illustration (6), *post*.

(5) Land belonging to the S. town trustees having been acquired by a waterworks company and the purchase-money paid into court, it was sought to apply the money in paying off a mortgage existing upon other property :—*Held*, that the words of sect. 80 of the Lands Clauses Act did not authorise the Court to order the waterworks company to pay the costs thereof : *Ex parte Sheffield Town (Trustees), In re Sheffield Waterworks* (1860), 8 W. R. 602.

(6) Money had been paid into court by a corporation in respect of the leasehold interest in certain lands of which the corporation were the reversioners in fee. The petition prayed that the purchase-money for this leasehold interest might be paid out of the moneys in court. Wood, V.-C., said he should follow the decision in *Ex parte Corporation of Sheffield, In re Manchester, Sheffield, and Lincolnshire Ry., ante*, where the Master of the Rolls considered a leasehold interest to be "an incumbrance" within the 69th section of the Lands Clauses Act : *Ex parte London Corporation* (1868), L. R. 5 Eq. 418.

(7) Local Acts contained provisions authorising the taking of land and the application of purchase-money in the purchase of other land, or, in the case of the parties interested being under disability, towards the discharge of incumbrances upon land settled to uses similar to those of the land taken, and provided for the payment by the parties taking the land, of the costs of a reinvestment in land :—*Held*, upon a petition seeking the application of money in court towards paying off incumbrances on the lands settled to the same uses, that the particular case was not provided for in the Acts, and that the promoters could not be ordered to pay the costs thereof : *In re Stanley of Alderley (Lord)* (1872), L. R. 14 Eq. 227.

(8) A petition prayed that part of certain moneys in court might be invested in paying off certain incumbrances upon other lands held upon like trusts, and asked that the promoters might be directed to pay the costs. Jessel, M.R., refused to follow *Ex parte Trafford, supra*, and, after intimating that it was perhaps hard to distinguish on principle cases of redeeming mortgages from those of redeeming land tax, said that he must follow the trend of authority, which showed that the promoters were not liable to pay these costs. They must, however, pay the costs of the petition and consequent order : *In re Mark's Trusts* [1877] W. N. 63.

(9) An application was made to the Court by R., the tenant for life of settled lands which had been taken under compulsory powers, that the purchase-money paid into court should be applied in discharge of an incumbrance affecting lands other than those taken, but settled therewith to like uses. There had already been a petition by R. and an order

thereon that the annual dividends on the purchase-money should be paid to him :—*Held*, that the company ought not to be ordered to pay the costs of the later application, as previous orders for interim investment and payment of dividends had been made : *In re Dublin, Wicklow and Wex ord Ry., Ex parte Richards* (1890), 25 L. R. Ir. 175.

(ii.) In building for substitution or improvement or for temporary accommodation.

Illustrations.

(1) The Court has power, under 6 & 7 Will. IV. c. 79, to order the Trinity House to pay the costs of *interim* investment upon purchases being made from persons under disability, but this does not in any way relate to the case of a *doubtful* title. Where therefore a person under disability, together with the trustees of the settlement under which he took his interest (the trustees having a power of sale) contracted to sell a lighthouse to the Trinity House, and the latter, being doubtful as to the title of the vendors, paid the purchase-money into court, under a clause in the Act, the Court, having regard to the fact that the objection to the title was not trivial, and that the purchase was for a public object, declined to give the vendors the costs of the interim investment in the funds, and the other usual consequential costs : *Ex parte Angell, In re Trinity House* (1841), 4 Y. & C. 496.

(2) The site of certain almshouses being required for the purpose of making a tunnel, compensation was awarded therefor (by an arbitrator) and the trustees petitioned that the money in court might be paid out to them upon their undertaking to apply it in building new almshouses. This was allowed and the railway company ordered to pay the costs of the application : *Ex parte Thorner's Charity* (1848), 12 L. T. (O.S.) 266.

(3) A jury assessed the injury done to certain schools at 200*l.*, which sum was paid into court under sect. 69. A petition was presented praying the payment out of the 200*l.* in order to apply it towards improving the schools :—*Held*, that such an object was within paragraph 3 of sect. 69, and that the 200*l.* might be paid out accordingly, the petitioners undertaking to apply the money in the manner proposed, and the costs to be paid as provided in sect. 80 of the Act : *In re Chelsea Waterworks, Ex parte St. John's, Fulham* (1856), 28 L. T. (O.S.) 173.

(4) Land forming part of the glebe of W. having been taken by a railway company, the Court was petitioned for an order that the money in court might be applied towards the cost of building a vicarage house for the petitioner. This was allowed and the company was directed to pay the petitioner's costs, on the ground that the case fell within the words of sect. 80, the proposed building being an investment authorised by the statute : *In re Whitfield (Incumbent)* (1861), 1 J. & H. 610.

(5) Farm buildings belonging to a dean and chapter having been injured by the proximity of a railway, compensation was paid therefor, and the sanction of the Court was asked for the application of the money in the erection of other farm buildings. This was granted and the railway company ordered to pay the costs of the petition : *Ex parte Dean of Canterbury, In re Kent Coast Ry.* (1862), 10 W. R. 505.

(6) The trustees of St. Thomas's Hospital petitioned the Court for its sanction to the reinvestment of 12,000*l.*, part of a sum paid into court by a railway company, in the provision of temporary accommodation for the patients of the hospital until a new hospital had been built. The Court allowed the petition and directed the railway company to pay the costs of the petition : *In re St. Thomas's Hospital* (1863), 11 W. R. 1018.

(7) The Court, under sect. 23 of the repealed Settled Estates Act, 1856, authorised money received on a sale effected under that Act to be applied in repairing and rebuilding houses,

and in making drains and roads, such improvements being for the permanent benefit of the settled estate : *In re Clitheroe's Settled Estate* (1869), 17 W. R. 345.

(8) Glebe land being taken by a railway company, the purchase-money was paid into court, and application was made to the Court to sanction its expenditure in part in the erection of farm buildings. This was allowed and the costs were directed to be paid by the railway company, but it was ordered that these costs should not include the certificate of the surveyor that the works had been completed : *Ex parte Shipton-under-Wychwood (Rector)* (1871), 19 W. R. 549.

(9) Part of the glebe of a rectory having been taken by the G. N. Railway Co., and the purchase-money paid into court, the rector petitioned that part of the money might be applied towards recouping outlay already made in building a farmhouse upon the glebe. This the Court sanctioned, and directed the company to pay the costs of the application : *Ex parte Gamston (Rector)* (1876), 1 Ch. D. 477.

(10) Certain moneys in court representing the value of land taken were allowed to be invested, part in the purchase of other land, and part in the erection upon such land of buildings and offices. The allowances made by the taxing master included fees paid to the architect and the quantity surveyor respectively :—*Held*, by Kay, J., that the fees were part of the expense of building and did not come within the meaning of “costs” : *In re Butchers' Co.* (1885), 53 L. T. 491.

See, however, Illustration (11), *infra*.

(11) Two houses having been acquired by the L. County Council, the purchase-money (2,500*l.*) was paid into court, and the Court afterwards sanctioned the application of 1,200*l.* in removing certain buildings upon other land and erecting new ones :—*Held*, that the costs of the architect's fees in relation to the contract for the buildings ought to be borne by the county council. Form of order given : *In re Arden* (1894), 70 L. T. 506.

- (c) If the application of the purchase-money in any way other than those specified in sect. 69 has been authorised, the promoters must pay the costs of the petition and of the order for it to be so applied.

Illustrations.

Lands of a charity in U. had been taken by a railway company, and the purchase-money had been paid into court. On petition by trustees of the charity they were directed to apply the fund towards improving the water supply of U. The trustees subsequently petitioned for payment out of the fund :—*Held*, that the company must pay the costs of the application : *In re Lathropp's Charity* (1865), L. R. 1 Eq. 467.

NOTE 1.—Municipal debts.

Illustration to Note 1.

Where money, the proceeds of the sale of corporation lands, has been paid into court under an Act authorising the Court to make such order concerning it, for the benefit of the parties interested, as the Court shall think fit, it is not competent for the Court, since the Municipal Corporations Act, 1835, to order the principal money to be paid in discharge of corporation debts accruing since the passing of that Act. The dividends only can be applied to that purpose : *Ex parte Hythe Corporation* (1840), 4 Y. & C. 55.

NOTE 2.—If the money is not reinvested in manner specifically directed by the Acts of Parliament, promoters will not have to bear costs.

Illustration to Note 2.

The G. W. Railway Co. were, by a clause in their Act, compelled, if they took any part of the glebe belonging to the vicarage of T., to take the house also; and the vicar and the patrons for the time being were empowered, on petition by them to the Court of Exchequer, with the consent of the ordinary, to lay out any part of the purchase-money in purchasing or erecting a new vicarage house, but the Act did not declare by whom the costs of getting the money out of court for this purpose should be borne:—*Held*, that the railway company were not liable for the “costs, charges and expenses” of getting the money out of court for the purpose of building the new vicarage house, and that the sections of the Act generally declaring the company liable to the costs, &c., of money taken out of court apply only to the cases where such money is to be reinvested in the manner specifically declared by the Acts of Parliament: *Ex parte Madon, In re Great Western Ry.* (1845), 4 Rail. Cas. 49.

- (d) If the moneys are invested in the redemption of land tax on, or the enfranchising of copyholds in, other land settled to the same uses (as authorised by sect. 69), the investment is an investment in land, and the promoters must pay the costs of the application *and* the other costs of the investment, which in the latter case includes costs of enfranchisement.

(i.) Redemption of land tax.

Illustrations.

(1) The costs of investing money paid into court by a railway company, as the price of land taken, in the redemption of land tax on other parts of the estate are payable by the company, although not specifically mentioned in sect. 80 of the Lands Clauses Act: *Ex parte Beddoes* (1854), 2 Sm. & G. 466.

(2) A sum of 755*l.*, which was in court, represented the purchase-money of land taken by a railway company. Of this sum it was sought to apply 223*l.* in redeeming the land tax on other lands:—*Held*, that this constituted “reinvestment” within the Lands Clauses Act, and that the costs of it were chargeable upon the railway company: *In re London, Brighton and South Coast Ry.* (1854), 18 Beav. 608.

(3) A petition prayed that a sum of money in court, representing the price of lands belonging to a hospital which had been taken by a railway company, might be applied to the redemption of the land tax upon other lands of the hospital. Jessel, M.R., made the order, and ordered the railway company to pay the costs of the investment and of the petition: *In re Bethlem Hospital* (1875), L. R. 19 Eq. 457. *Ex parte Northwick* (1834), 1 Y. & C. 166; 41 R. R. 235; *Ex parte Trafford, In re Liverpool and Manchester Railway Act* (1837), 2 Y. & C. 522; 47 R. R. 451; *In re London, Brighton and South Coast Ry.*, *ante*, and *Ex parte Beddoes*, *ante*, followed.

(ii.) Enfranchisement of copyholds.

Illustration.

A railway company took from J. 4½ acres of copyhold land, and the purchase-money was paid into court. The Court was asked to sanction the use of the money in enfranchising other copyholds:—*Held*, that enfranchisement was, in fact, such a purchase of other

hereditaments as might fairly come within the words of the Lands Clauses Act, and that the company must pay the costs of the enfranchisement: *Dixon v. Jackson* (1856), 25 L. J. Ch. 588.

- (e) The application of purchase-money to the purchase of leasehold interests in other lands held upon similar trusts, is regarded as equivalent to the discharge of an incumbrance, in which case only the costs of getting the fund paid out of court, and not the costs of reinvestment, will be payable by the promoters (see *In re Manchester, Sheffield and Lincolnshire Ry., Ex parte London Corporation*, and *In re Mark's Trusts*, ante, p. 513) ; but this rule does not apply when the application of the money is under the Episcopal and Capitular Estates Act, 1851, and the Lands Clauses Act.

Illustrations.

(1) A bishop presented a petition to have money paid into court by certain railway companies applied in buying up a lease of other land belonging to the see :—*Held*, that this amounted to an investment in land, and that, under the Lands Clauses Act, and the Episcopal and Capitular Estates Act, the companies must pay the costs in the same way as if the purchase had been of freehold lands: *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14.

(2) The dean and canons of M. presented a petition to have money which had been paid into court by several railway companies for lands taken, reinvested in the purchase of leasehold interests in other lands of which the petitioners were reversioners in fee :—*Held*, that the companies must pay the costs of reinvestment in the same way as if the purchase had been of freeholds : *Ex parte Manchester (Dean)* (1873), 28 L. T. 184.

- (f) When the application is for the reinvestment of the money in court, together with other money of the petitioner, all the additional costs so occasioned will be payable by the petitioner, not by the promoters.

Illustrations.

(1) The devisees in trust under a will petitioned that a sum of money paid in by a railway company, together with another sum held by them for a like purpose, might be invested in the purchase of certain land of the value of the two sums together, and also asking for the taxation and payment by the company to the petitioners of the costs, charges, and expenses of the purchase :—*Held* that, under the Act of Parliament, the petitioners were not entitled to any such costs, charges, and expenses, nor to the costs of the application: *Ex parte Tetley, In re Great North of England Ry.* (1845), 4 Rail. Cas. 55.

(2) H. purchased lands costing him 1,000*l.* to take the place of other lands acquired by a railway company, for which latter 644*l.* had been paid into court :—*Held*, that H. was entitled to the same costs as he would have been entitled to receive from the company if the new purchase had been for 644*l.* only: *Ex parte Hodge, In re Sheffield and Lincolnshire Ry.* (1848), 16 Sim. 159.

(3) Settled lands were taken and the purchase-money (140*l.*) paid into court. A suitable reinvestment was found, but the amount wanted was 260*l.*, whereupon the tenant for life advanced the difference :—*Held*, that the costs could not be increased through the price paid exceeding 140*l.* : *In re Branmer's Estate* (1849), 14 Jur. 236.

(4) When money has been paid into court under the Lands Clauses Act, and is afterwards invested together with a larger sum of money in the purchase of land held under one title, the company must pay all costs except the extra stamp duty on the surplus money : *Ex parte Carlisle Corporation* (1852), 1 W. R. 103.

(5) Lands belonging to K. College were taken by a railway company and the purchase-money (290*l.*) paid into court. Upon a petition for the reinvestment of this sum as part of a larger sum of 1,800*l.*, it was ordered that the costs must be paid as directed by the Lands Clauses Act, the petitioners being left to bear the rest of the costs : *Ex parte King's College, Cambridge, In re Southampton and Dorchester Ry.* (1852), 5 De G. & S. 621.

(6) Settled land was taken by a railway company, and the purchase-money (300*l.*) paid into court. It was proposed afterwards to invest it in the purchase of land which would cost 500*l.*, the tenant for life undertaking to advance the difference of 200*l.* :—*Held*, that the costs to be paid by the company must not thereby be increased : *In re Loveband* (1860), 30 L. J. Ch. 94.

(7) A petition prayed the application of a sum of 1,013*l.*, paid into court for land taken by a railway company, towards making up a sum of 6,200*l.* proposed to be laid out, as authorised in a suit in another court, in the purchase of land ; and further asked for costs of the investment and of the petition against the company :—*Held*, that the company ought to pay only the costs of the application and not of the conveyance : *In re Bagot* (1866), 14 W. R. 471.

(8) A sum of 539*l.*, which was in court, represented money paid by a railway company in respect of glebe land taken. Another sum of 4,414*l.* represented moneys which had arisen from the granting of leases, under a private Act, of mines belonging to a curacy. That Act directed moneys paid for leases to be paid into court until a proper purchase of lands should be found, and approved by the Court. The curate had entered into two conditional contracts for the purchase of lands at the respective prices of 2,500*l.* and 2,275*l.*, and petitioned for the sanction of the Court :—*Held*, that the money paid in by the railway company should be applied to one only of the two contracts, and that the company ought to pay—(1) half the costs of the petition, such costs not to exceed those of a summons adjourned to the judge in chambers ; (2) a rateable proportion of the *ad valorem* stamp on the conveyance ; (3) one-fourth part of the other costs of reinvestment under both the contracts : *Ex parte Bilston (Perpetual Curate)* (1889), 37 W. R. 460.

- (g) If the uses of the land at the time of the petition differ from the uses at the time it was acquired, or if it is subject to mortgages since created, the Court will order the investment subject to the different uses or fresh mortgages, and the promoters must still pay the costs of the reinvestment.

Illustrations.

(1) Land forming part of a settled estate was taken by a railway company and the purchase-money paid into court. The settled land was subject to mortgages, some of which were created before and the others after the date when the land was acquired. The tenant for life petitioned for the reinvestment of the purchase-money in land :—*Held*, that there

was power to order the purchase-money to be reinvested in land to be conveyed to the uses of the settlement and to be subject to the existing mortgages; and that all the incumbrancers were entitled to notice of the reinvestment and that the railway company must pay the entire costs of the reinvestment : *Ex parte Peyton's Settlement, In re Eastern Counties Ry.* (1856), 4 W. R. 380.

(2) A petition was presented by the tenant for life of certain lands, part of whose lands was taken by a railway company under their powers. At this time, and when the purchase-money was paid into court, the uses of the land sold to the company were not the same as at the date of the petition. The petition asked that the purchase-money might be invested in land to be conveyed to uses different from those declared of the land sold, and that the company might be directed to pay the costs of the reinvestment and the petition. This the Court granted : *In re De Beauvoir* (1860), 29 L. J. Ch. 567.

(3) A railway company bought lands and paid the purchase-money into court. The person absolutely entitled died. By his will dated before the purchase he devised the lands in strict settlement. It was *held* that the costs of reinvestment of the fund in land must be borne by the company : *In re Benyon's Trust* (1860), 8 W. R. 425.

(4) In 1865 a railway company took, under their powers, certain land which was so settled, under the terms of the will of J. J., that a father and son had at that time the absolute beneficial interest between them, and the purchase-money was paid into court :—*Held*, by James, V.-C., that the owners were entitled to have part of the fund paid out to them as being absolutely entitled, and, at the same time, to have another part reinvested in the purchase of land, to be settled to somewhat different uses, at the cost of the company : *In re Jones' Trust Estate* (1870), 39 L. J. Ch. 190.

(5) Certain leaseholds bequeathed by W. P. were taken by a railway company, and the purchase-money paid into the bank. The Court, upon the petition of all parties interested, approved a proposed investment in freehold houses, this “being substantially a settlement upon the like uses” : *In re Parker's Estate* (1872), L. R. 13 Eq. 495.

(h) The costs of reference to chambers for consideration of the title of land to be purchased, and of conveyancing counsel to the Court, and of the solicitor to the petitioner (under the scale in the Solicitors' Remuneration Act, 1881, Sched. I., Part I.), for investigation of title, and preparing and completing conveyance (the costs being restricted to those payable by the purchaser under an open contract), must be paid by the promoters.

Illustrations.

(1) The Court will, on the construction of the general clauses in railway Acts, fix the railway company with the costs of the master's report as to the title to the lands to be settled to the like uses : *per Abinger, C.B.*, in *Ex parte Marsh, In re Eastern Counties Ry.* (1841), 5 Jur. 502.

(2) A petition asked that a sum of money which had been paid into court by a railway company for the purchase of certain land might be invested, and that the costs, charges and expenses of the application and of the investment, and also of preparing the abstract

of title and making the conveyance, might be paid by the company. The Court made the order as asked, save as to the costs of the abstract and conveyance, which, it was *held*, there was no power to include: *Ex parte Bath (Marquess)*, *In re Wilts, Somerset and Weymouth Ry.* (1847), 4 Rail. Cas. 567.

(3) All questions of title relating to land, in which money in court is to be invested under the order of the Court, are, as a general rule, referred to chambers for consideration, and the judge in chambers will there consider whether he can approve of the title without sending it to the conveyancing counsel of the Court: *per* Stuart, V.-C., in *In re Jones' Settled Estate* (1855), 1 Jur. (N.S.) 817; see now R. S. C. Ord. LI., rule 7.

(4) Land belonging to the Merchant Taylors' Co. had been taken partly by the G. E. Railway Co. and partly by the Metropolitan Board of Works, and upon a proposed reinvestment of the purchase-money in the purchase of other lands, the title thereto had been investigated in chambers in the usual way. The solicitor to the Merchant Taylors' Co. made out his bill of costs on the footing of the scale in the order made under the Solicitors' Remuneration Act, 1881, Sched. I., Part I., charging the *ad valorem* amount for investigation of title and preparing and completing the conveyance:—*Held*, that the fee was rightly charged, the exception in Sched. I., Part I., rule 11, which provides that the scale shall not apply in cases of sales under the Lands Clauses Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, not being applicable; *In re Merchant Taylors' Co.* (1885), 30 Ch. D. 28.

- (i) If the purchase-money is invested before reference to the master as to its propriety, the promoters will not have to pay the costs of purchase.

Illustration.

The purchase-money of land taken was invested in other land before the reference to the master as to its propriety:—*Held*, that the proposed purchase did not come within sect. 69 of the Lands Clauses Act, and the petitioner could not have the costs of the purchase, although the reinvestment was approved: *Ex parte Bouverie* (1848), 5 Rail. Cas. 431.

- (j) If the amount is small, leave may be given to dispense with the investigation of the title and reference to the conveyancing counsel.

Illustrations.

(1) A petition was presented for the investment of a comparatively small sum in land. The Court allowed the reinvestment and gave leave to make proposals in chambers to dispense with the investigation of the title either wholly or in part: *In re Blomfield* (1876), 25 W. R. 37.

(2) Land belonging to a charity was taken by a railway company and the purchase-money (350*l.*) paid into court. The feoffees of the charity had entered into a provisional contract for the purchase of a small strip of land adjoining the charity property, for 50*l.*, and presented a petition under the Lands Clauses Act that the contract might be carried out and that part of the fund in court might be applied to the purchase. The Court made the order, directing that the reference to the conveyancing counsel might be dispensed with, and ordering the petition to be amended by asking that future applications as to the balance of the fund might be made in chambers: *In re Lapworth Charity* [1879] W. N. 37.

- (k) The costs of private counsel advising on the whole title will not be allowed.

Illustration.

The Trinity House, acting under statutory powers, purchased a lighthouse, and paid the purchase-money into court. The person who was entitled to have a large part of the money reinvested in land caused an abstract of title to the land proposed to be purchased to be laid before counsel. The same abstract afterwards came before a conveyancing counsel to the Court, who, in consultation with the purchaser's counsel, approved the title. Upon taxation, the taxing master disallowed the fees paid to the purchaser's counsel. The Court *held* that the fees for consultation between the two counsel were a reasonable charge and that some allowance ought to be made for the employment of private counsel, but refused to allow the costs of the private counsel advising on the whole title: *In re Jones' Settled Estates* (1858), 4 Jur. (N.S.) 581.

- (l) If the contract for the purchase of lands throws on the purchaser the costs ordinarily borne by the vendor, such costs are not payable by the promoters.

Illustrations.

(1) When a railway company has paid money into court, and the person whose lands were taken wishes to reinvest the money, the company cannot be called on to pay such costs as by a voluntary agreement on the part of the person so investing were to be paid by him: *In re North Staffordshire Ry., Ex parte Alsager (Incumbent)* (1854), 2 Eq. R. 327.

(2) Petition for the reinvestment in ground rents of the purchase-money paid into court by a railway company for land taken. A conditional contract had been entered into containing the ordinary stipulation throwing part of the expense of verifying the abstract on the purchaser. The Court sanctioned the contract, and made the usual order for an inquiry as to the title, and observed that the question as to the costs to be paid by the company could be raised before the taxing master: *In re Mason's Trust Estate* [1872] W. N. 77.

(3) Land belonging to a charity was taken by three different bodies, and the purchase-moneys paid into court. The governors of the charity entered into a conditional contract with C. for the purchase of a freehold house, and one term in the contract was that the costs of furnishing abstracts and certain other expenses which in an open contract would be thrown on the vendor, should be borne by the purchaser. A petition was presented asking for the approval of the Court to the investment and for the application of part of the money in court to the proposed purchase, and that the costs should be paid, as to the *ad valorem* stamp, rateably between the three bodies, and as to the residue of the costs by them equally:—*Held*, that the costs must be limited to such costs as would in an open contract be purchaser's costs: *Ex parte Christ's Hospital (Governors)* (1875), L. R. 20 Eq. 605.

(4) Where the purchase-money of land taken was proposed to be reinvested in other land and the costs ordinarily borne by the vendor were, by the contract, thrown upon the purchaser:—*Held* that, in the circumstances, such costs were not costs of reinvestment payable by the promoters: *In re Temple Church Lands* (1877), 47 L. J. Ch. 160.

(5) A corporation took land belonging to a charity under the Lands Clauses Act, and paid the money into court. The trustees, by a contract, which was approved by the Court, purchased other lands, covenanting to give the vendors a long lease, each party to pay their own costs of the lease. On the petition for reinvestment, it was *held* that the corporation were not bound to pay the charity's costs of the lease as part of the costs of reinvestment: *Ex parte Thavies' Charity*, [1905] 1 Ch. 403.

- (m) If the title of land purchased is subject to incumbrances necessitating a large number of reconveyances, the promoters cannot be charged with the cost of them without their express consent.

Illustration.

Where the title to lands taken by a corporation under statutory powers proved to be subject to numerous incumbrances which necessitated the execution of eight reconveyances to the vendors:—*Held*, that the corporation could not be charged with the costs thereby incurred, unless they had been incurred with the express consent of the corporation : *Jones v. Lewis* (1847), 1 De G. & Sm. 245.

- (n) Application may be made to invest part of the purchase-moneys and subsequent application to invest part of the remainder, and if the Court deems these investments for the benefit of the parties and not capricious or vexatious or unnecessary, the promoters must pay the costs. As many as six applications in all have been allowed.

Illustrations.

(1) Where, by a railway Act, power was reserved to the Court to order the reasonable expenses of reinvesting a sum of money in the bank, the proceeds of land purchased by the company, to be paid by the company, the Court will order the costs of two applications for reinvestment of parts of the same sum to be paid by the company : *Ex parte Eton College, In re London and Birmingham Ry.* (1842), 3 Rail. Cas. 271.

(2) When the purchase-money of lands taken by a railway company under the provisions of their Acts is directed to be paid into court and reinvested in other lands, the Court will allow the costs of two such investments : *Ex parte Boxmoor Waste Lands, In re Birmingham Ry.* (1844), 3 Rail. Cas. 513.

(3) Where the amount of the purchase-money was 125,000*l.* and the costs paid by the company (the purchasers) of the first two investments were 1,576*l.* 4*s.* 10*d.*, the Court allowed the vendor the costs of the application as to a third investment of the purchase-money, being of opinion that there was nothing oppressive in the circumstances : *In re St. Katherine's Dock* (1844), 3 Rail. Cas. 514; see Illustration (10), *post*.

(4) Land belonging to B. had been taken by a railway company, and there had been four successive purchases absorbing only part of the purchase-money. The Court allowed the costs of a fifth application, although the proposed investment took only a small part of the balance in court : *Ex parte Bouverie, In re London and Birmingham Ry.* (1846), 4 Rail. Cas. 229.

(5) Under an Act of Parliament, a corporation took lands for public purposes. The Act empowered the Court to order the costs, charges and expenses of reinvesting the compensation money to be paid by the corporation. On a fourth application to reinvest the residue, amounting to 63*l.* :—*Held*, that the proceeding was not so vexatious as to disentitle the party to the costs : *In re Merchant Taylors' Co.* (1847), 10 Beav. 485.

(6) The corporation of the Trinity House had power to purchase lighthouses, and their special Act directed that all reasonable costs, charges and expenses of reinvesting the purchase-money should be borne by the corporation :—*Held*, that in the absence of any

proof of an attempt to throw expense upon the corporation by an improper exercise of the power of reinvestment, there was no limit to the number of separate investments for the costs of which the corporation were liable: *Jones v. Lewis* (1850), 2 Mac. & G. 163.

(7) "There is but a small sum left, viz., 243*l.*, and it is sought to lay out 90*l.* of that in a purchase. Now, no doubt the intention of the Legislature was to protect companies against reckless and careless reinvestments, but not against the costs of *bonâ fide* reinvestments. The Act clearly contemplates several and successive investments, for it speaks of 'different sums' and reinvestments at 'different times,' which is inconsistent with the construction contended for. . . . I think the case within the intention of the Act, and the company must pay the costs": *per Kindersley, V.-C., In re St. Bartholomew's Hospital* (1859), 4 Drew. at p. 426.

(8) Land which was the subject of an administration suit having been taken by a railway company, and the value paid into court, an order was obtained for the investment of a large portion of the money in land. Afterwards a petition was presented for investing a small part of the remaining fund, and all parties to the suit were served:—*Held*, that the Court, deeming the purchase to be for the benefit of the parties, and neither capricious nor unnecessary, the company must pay the costs: *In re Brandon's Estate, Brandon v. Brandon* (1862), 2 Dr. & S. 162. "It is said that the remaining sum in court ought to be laid out in one sum, and so, *primâ facie*, no doubt it ought. But if there is good reason shown to the Court for a partial laying out of the sum in court, as there is here, it not being denied that the purchase is greatly for the benefit of the estate, the company must pay the costs": *per Kindersley, V.-C.*, at p. 166, *ib.*

(9) The authorities "established the rule that a case of vexatious and unnecessary expense must be made out against the petitioners to disentitle them to their costs of such reinvestments. . . . The corporation, therefore, must pay the costs": *per Wood, V.-C.*, in *Ex parte The Fishmongers' Co.* (1862), 1 N. R. 85.

(10) Land belonging to a hospital was taken by the St. K. Dock Co. under a private Act, which authorised the reinvestment of purchase-money in the redemption of land tax or the discharge of any incumbrance or the purchase of houses or lands, &c. The purchase-money amounted to 125,000*l.*, and there had been six applications to the Court for reinvestment, still leaving 38,440*l.* uninvested:—*Held*, that there was nothing unreasonable in the circumstances, and the company must therefore pay the costs of a further application: *Ex parte St. Katharine (Hospital)* (1881), 17 Ch. D. 378.

- (o) If the Court approves of an investment and another application for approval is necessary (*e.g.*, if the lands purchased are sold in another suit) the promoters must pay the costs of the second application.

Illustration.

A. sold certain lands to a railway company; the purchase-money was paid into court; and the company took possession. The money was afterwards invested in the purchase of lands sold in another suit, and a petition for approval became necessary in that suit:—*Held*, that two petitions being thus essential, the company must bear the costs of both: *Carpmael v. Profitt* (1853), 17 Jur. 875.

- (p) If the purchase-money be for lands in mortmain and it is invested in the purchase of other lands the conveyance must be enrolled under the Mortmain Acts, and the promoters must pay the costs of the enrolment.

Illustration.

A public body purchased land in mortmain belonging to C. Hospital and paid the money into court under an Act of George III. The fund was invested in the purchase of other lands which the governors of the hospital caused to be enrolled under the Statute of Mortmain :—*Held*, that the enrolment was necessary, and that the costs must be paid by the public body as costs of reinvestment : *In re Christ's Hospital* (1864), 12 W. R. 669.

- (q) If an attempt to invest money has to be abandoned, the promoters may or may not have to pay the costs of the abortive investment. They will have to do so if the master approves the title but the purchase is abandoned owing to the great expense of perfecting it, or if afterwards a defect is discovered which makes it impossible to carry out the conveyance. But they will not be ordered to pay such costs if the grounds of abandonment are inadequate (*e.g.*, difficulties in investigating the title), or if the Court refuses its approval of the proposed purchase.

Illustrations.

(1) Land having been taken by a railway company, the value was paid into court, and, the parties wishing to purchase another piece of land, a reference was made to the master as to the propriety of the purchase. The master refused to certify that it was a proper purchase, but did not state on what ground. Application was then made to have the money paid out of court, and asking that the company might pay the costs of the former application and reference :—*Held*, that the matter was in the nature of an abortive scheme, and that, in the circumstances, the costs ought to come out of the fund : *Ex parte Stevens* (1851), 15 Jur. 243.

(2) Where the proposed investment was such that the Court gave its sanction, but, owing to the discovery of a defect, the conveyance could not afterwards be carried out :—*Held*, that the promoters who had taken the land represented by the purchase-money must bear the costs of the abortive attempt to reinvest : *In re Woolley's Estate* (1853), 17 Jur. 850.

(3) A railway company took certain land of which H. was tenant for life. H. petitioned for the investment of the fund in the purchase of other lands, but the Court refused its approval of the proposed purchase :—*Held*, that the company was entitled to have the costs paid out of the fund, and no order was made as to the petitioner's costs : *In re Hardy's Estate* (1854), 18 Jur. 370.

(4) Part of the land which was subject to the trusts of the will of L. C. was taken by two railway companies. An attempt made by the petitioner, who was tenant for life of the estate, to invest the money proved abortive, owing to the occurrence of difficulties in the investigation of the title :—*Held*, that the grounds of abandonment seeming to be insufficient, the companies ought not to be saddled with the costs : *Ex parte Copley* (1858), 4 Jur. (N.S.) 297.

(5) Where by a special Act a railway company taking lands was to be liable to pay only such costs with respect to the reinvestment of purchase-money as the Court should "deem reasonable" :—*Held*, that the company was under no obligation to pay the costs of an abortive attempt at reinvestment : *In re Macdonald, In re London and Blackwall Ry.* (1860), 2 L. T. 168.

(6) Certain portions of an estate which was subject to the trusts of a will having been taken by the North Staffordshire Railway Co., the purchase-money was paid into Court, and the trustees purchased at a public auction certain pieces of land. The usual reference was made to the master, who approved the title; but it was ultimately thought that much expense would be incurred by perfecting the title, and the purchase was abandoned:—*Held*, that the costs incurred must be borne by the company, the abandonment of the purchase being upon reasonable grounds: *Ex parte Vaudrey, In re North Staffordshire Ry.* (1861), 3 Giff. 224.

(7) Purchase-money paid for certain glebe lands acquired was proposed to be invested in the purchase of a cottage and the erection of other buildings. It was afterwards found that the cottage could not be conveyed:—*Held*, that the costs incurred as to the attempted purchase were costs of reinvestment and must be paid by the company: *Ex parte Holywell (Rector), In re Wisbeach, St. Ives and Cambridge Ry.* (1865), 2 Dr. & Sm. 463.

(8) A railway company took some property belonging to the petitioners, and paid the value thereof into court. A petition for reinvestment was presented, and an order made approving the purchase and referring the title to chambers. It was found, however, that a good title could not be made, and hence the proposed purchase fell through. The parties applied that the costs of and incidental to the abortive attempt to purchase might be paid by the company. The Court ordered the company to pay the costs: *In re Carney's Trusts* (1872), 20 W. R. 407; *Ex parte Holywell (Rector), In re Wisbeach, St. Ives and Cambridge Ry., supra*, followed.

(9) Where two ineffective petitions for payment out had been presented to the Court with respect to purchase-money which had been paid into court, Hall, V.-C., disallowed the costs of a third on the ground that the railway company (the purchasers) had already borne enough costs: *Ex parte and In re Winder* (1877), 6 Ch. D. 696.

- (r) On an application by a tenant for life for reinvestment of purchase-money, the persons entitled in remainder must be served, and if in default of such service the application has to be reheard, the promoters will only have to pay the costs of one hearing.

Illustrations.

(1) When purchase-money had been paid into court in respect of lands let on lease at a rack rent, and settled to the use of a tenant for life, with remainder over, the remainderman was made respondent to a petition by the tenant for life for investment and payment of dividends, and the company was ordered to pay the remainderman's costs: *In re Crane* (1869), L. R. 7 Eq. 322.

(2) Where, through the persons entitled in remainder not having been served, a petition by a tenant for life for the reinvestment of purchase-money paid into court had to be reheard, the purchasers (a waterworks company) by whom the money had been paid into court were ordered to pay the costs of one hearing only, and the costs of the tenant for life, the costs of remaindermen and the trustees were directed to be paid out of the fund in court: *In re Leigh's Estate* (1871), L. R. 6 Ch. 887.

- (s) Upon approval and execution of the conveyance the costs become payable. If they are not paid, interest may be ordered from the date of the taxing master's certificate.

Illustrations.

(1) Land belonging to E. College had been taken by a railway company, and the money paid into court. On a petition for payment out for reinvestment in land:—*Held*, that the company were entitled to have the words “upon the approval and execution of the conveyance” inserted in that part of the order which directed payment of costs, under sect. 80 of the Lands Clauses Act: *Ex parte Eton College, In re Ipswich and Bury St. Edmunds Ry.* (1859), 7 W. R. 710.

(2) Application was made for leave to issue an execution to enforce an order dated more than six years before, for payment of costs and interest thereon from date of order. The Court gave leave to issue a writ for the costs with interest from the date of the taxing master’s certificate, and intimated that the form of the order made under sect. 80 of the Lands Clauses Act might require reconsideration if it was an order which carried interest on costs: *In re Bird’s Estate* [1889] W. N. 182.

D. Costs of obtaining orders.**(a) Proper orders for foregoing purposes.**

See under respective heads.

(b) Orders for payment of dividends.

- (i.) The promoters can only be ordered to pay the costs of obtaining orders for the payment of dividends and are not liable for the costs of payment itself; but if under any statute certain formalities must be observed before the order becomes effective the costs thereof must be borne by promoters.

Illustrations.

(1) A railway Act provided for the investment of purchase-money and the costs and expenses thereof “together with the necessary costs, charges and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and for the payment of the dividends and interest of the Government or real securities upon which such purchase-money may be invested, &c., to be paid by the company”:—*Held*, that the costs given with regard to the payment of dividends had reference to the costs of obtaining the order and not to the costs of the payment itself: *Ex parte Athorpe, In re Hull and Selby Ry.* (1839), 3 Y. & C. 396.

(2) Where the provisions of the railway company’s special Act contained no reference to the costs of payment out of principal, dividends, or interest:—*Held*, that the costs of the payment of the dividends to accrue in respect of a sum, the produce of land taken by the railway company, and ordered to be invested, were not payable by the company: *Mitchell v. Newell* (1844), 3 Rail. Cas. 515.

(3) A company took a leasehold under their compulsory powers, and the purchase-money was invested:—*Held*, that the company must pay the expenses of half-yearly sales of stock for distribution: *In re Long’s Estate* (1853), 1. W. R. 226.

(4) Lands belonging to a see having been taken by various railway companies at different times, orders had been made for the investment of the moneys in court and payment of the dividends to the bishop and the costs of each had been provided for, but, Besides these, further costs of affidavits and of appearing before the Accountant-General

had been incurred in obtaining payment of each dividend thereunder, and the bishop now sought repayment of these costs :—*Held*, that he was entitled to them : *Ex parte Ecclesiastical Commissioners* (1870), 39 L. J. Ch. 623.

NOTE.—In the event of promoters under their Act not being liable to pay costs of orders for payment of dividends, the following cases indicate from what funds such costs are to be paid :—

Illustrations to Note.

(1) The costs of a tenant for life on his petition for payment of the income of a fund paid into court must be paid out of the income, and those of the trustees out of the *corpus*. It is not necessary upon such an occasion to serve the remainderman : *per* Wood, V.-C. (Lord Hatherley), in *In re Whitling* (1861), 9 W. R. 830.

(2) Where a trust fund has been paid into court under the Trustee Relief Act, the costs of a petition by the tenant for life for payment to him of the dividends will be payable out of the income : *In re Marner's Trusts* (1866), L. R. 3 Eq. 432. Followed in *In re Evans' Trusts* (1872), L. R. 7 Ch. 609.

(3) Where the tenant for life of a fund in court obtained an order for payment of the dividends, but no provision was made as to the costs of the application, the Court, after a lapse of two years, allowed the order to be amended by adding a direction that the costs should be paid out of the *corpus* of the fund : *In re Tanner's Trust* (1866), 14 L. T. 589.

- (ii.) Promoters must pay the costs of alteration of orders for payment of dividends to parties entitled for life or for the time being ; but the Court will, if possible, so frame its order as to save payment of future costs.

Illustrations.

(1) A petition was presented for an order that certain dividends might in future be paid to two persons who had been appointed trustees in the room of two deceased trustees. There had been an order for the payment of the dividends to the former trustees :—*Held*, that there being nothing vexatious in the case, the company must pay the costs : *In re Bazett's Trustees* (1850), 16 L. T. (O.S.) 279.

(2) Purchase-money for land taken under an Act, and which belonged to churchwardens and overseers, having been invested and an order made for payment of the dividends to the vestry clerk, who had since died, a petition was presented for payment of the dividends to the churchwardens and overseers for the time being :—*Held*, that the costs of both petitions must be borne by the purchasers : *In re Royal Exchange Act* (1850), 14 Jur. 28.

(3) Land having been taken by a railway company and the purchase-money paid into court, an order was made directing investment and payment of the dividends to the incumbent of G. S., but only provided for the payment to the then incumbent of the costs of the application on which the order was made. A subsequent incumbent executed a power of attorney to receive the dividends, and filed affidavits that he was the incumbent. On the company declining to pay the costs thus incurred, he applied in chambers for an order for their taxation and payment, which was granted :—*Held*, that the order had been rightly made : *Ex parte Guilden Sutton (Incumbent)* (1856), 8 De G. M. & G. 380.

(4) The M. Board of Works took lands of a lunatic and paid the purchase-money into court : the fund was invested in Consols, and the dividends were payable to two

joint committees of the lunatic. One committee died and the other was appointed sole committee by the master, who declined to make an order for payment of dividends. On petition by the committee for payment of past and present dividends to him :—*Held*, that both past and future dividends ought to be carried to the credit of the lunacy, and when so carried paid to the committee ; and the Court intimated that any future appointment of a new committee might contain a direction for the dividends to be paid to him, and that as the dividends would be standing to the credit of the lunacy any application affecting them need not be served on the Board :—*Held also*, that the Board must pay the costs of the petition : *In re Ryder* (1887), 37 Ch. D. 595.

- (iii.) If the proper order is not obtained and an alteration is afterwards necessary, the promoters will not have to pay the costs of alteration unless the Court holds both parties equally to blame in not obtaining a proper order at first.

For forms of order *see* Seton on Judgments.

Illustrations.

- (1) See *In re Bazett's Trustees*, *ante*, p. 527.

(2) Land subject to the trusts of a will was taken, the purchase-money ordered to be invested and the dividends paid to the two trustees of the will by name. One of the trustees died, and a new petition was then presented for the payment of the dividends to the surviving trustee :—*Held*, that, as it was as much the fault of the company as of the petitioners that the right order was not made at first, the company must pay the costs : *In re Goe's Estate* (1854), 3 W. R. 119.

(3) The purchase-money of land which was subject to a trust, and which had been taken by a railway company, was ordered to be invested and the dividends paid to the then trustees. Afterwards new trustees were appointed, and they presented a petition for an order directing payment of the dividends to them :—*Held*, that the company ought not to have to pay the costs of the latter petition : *In re Audenshaw School* (1863), 1 N. R. 255.

(4) Lands subject to the trusts of a marriage settlement were taken by a local board and the purchase-money paid into court and afterwards invested. On the petition of the trustees of the settlement the dividends were ordered to be paid to them or one of them, by name. Both the trustees having died, the court, upon the petition of the new trustees for the payment of the dividends to them, refused to direct the local board to pay the costs of the second petition, a proper order not having been made on the first petition : *In re Pryor's Settlement Trusts* (1876), 35 L. T. 202.

(5) After an order had been made directing the dividends of money invested to be paid to P. M. as trustee until further order, two other trustees were appointed and the Court directed that P. M. should transfer all the trust property into the names of the three. A petition was afterwards presented for the payment of the dividends to the three trustees or the survivors or survivor of them, or to the trustee or trustees for the time being :—*Held*, that the company must pay the costs, being as much to blame for the mistake made as the petitioners were : *In re Metropolitan Ry. and Maire* [1876] W. N. 245.

- (iv.) If by his own act the person entitled for life makes an alteration of the order necessary, the promoters will not have to pay the costs of the alteration.

Illustration.

Land of which B. was tenant for life was taken by a railway company and the purchase-money paid into court. B. had mortgaged his life interest to M., to whom the Court directed the dividends to be paid during the life of B. M. died, and her executors and B. sold the life interest. The purchaser, the executors, and B. then petitioned for the payment of the dividends to the purchaser during B.'s life :—*Held*, by Kindersley, V.-C., that the railway company ought not to have to pay the costs of the application : *In re Byron's Trusts* (1859), 5 Jur. (N.S.) 261.

- (v.) If the *cestui que trust* bequeath the stock to another for life, the promoters must pay the costs of the necessary alteration of the order.

Illustration.

The purchase-money of land taken by a railway company was paid into court to their credit, and afterwards invested in stock in trust for B., who died bequeathing it to C. for life. The Court, on a petition by B.'s executors in directing payment of the dividends to C., ordered the costs of the petitioners to be paid by the company : *In re Lye's Estates* (1866), 13 L. T. 664.

- (vi.) If after the death of the tenant for life the property is resettled, the promoters are not liable to pay for the consequent alteration of orders.

Illustration.

Land, subject to the trusts of a marriage settlement, was taken by a railway company and the purchase-money paid into court. The dividends were thereafter received by a tenant for life, and, upon her death, her husband resettled the property and presented a petition for payment of the dividends to himself :—*Held*, that the railway company was not liable to pay the costs of the petition : *In re Pick* (1862), 31 L. J. Ch. 495.

E. Orders for payment out of court.

- (a) A person who is absolutely entitled to a share of the money in court should not serve the other parties entitled as respondents, but they should be joined in the application ; and the application should be served upon the persons interested, such as, *e.g.*, mortgagees or defendants in an administration action.

Illustrations.

(1) An estate was directed to be sold and the proceeds distributed. One of ten persons entitled to receive the proceeds petitioned for the payment out of money paid into court under the Lands Clauses Act as purchase-money for part of the land taken, and served the other nine :—*Held*, that they should have been asked to join in the petition, and that the company were not bound to pay their costs : *Melling v. Bird* (1853), 17 Jur. 155.

(2) A railway company took lands held in trust with a power of sale for a testator's children and grandchildren in various proportions and paid the purchase-money into court. The surviving trustee and some of the *cestui que trusts* presented a petition for

payment out, to which infant *cestui que trusts*, and one who was absolutely entitled, were made respondents and appeared by four separate counsel :—*Held*, that the company must pay the costs of all the appearances except that of the beneficiary absolutely entitled, who had originally joined in the petition, but had been made a respondent for no apparent reason : *In re Long's Trusts* (1864), 10 Jur. (N.S.) 417.

(3) A fund in court represented purchase-money of lands subject to the trusts of a will which had been mortgaged by the testator, and the tenant for life of which had mortgaged his interest prior to the lands being taken by a railway company. On a petition for payment out :—*Held*, following *In re Brook's Will* (1861), 30 Beav. 233, that the company must pay the costs of the mortgagee of the life interest : *In re Brooke* (1864), 12 W. R. 1128

(4) A marriage settlement contained a power to the trustees to raise any sum not exceeding 500*l.* for any child of the marriage, and to apply the same for the advancement in life of the child. A railway company took part of the land comprised in the settlement and paid the value thereof into court. The trustees desired to apply 400*l.* for the purpose of paying the expenses of one of the children upon his being articulated to a solicitor. The Court allowed the petition, and ordered the railway company to pay the costs : *In re Curwen's Settlement* [1880] W. N. 83.

- (b) The Court had formerly no power to order the promoters to pay the costs of transfer to a person absolutely entitled ; but it is submitted that now by sect. 5 of the Judicature Act, 1890, the Court has discretion to give costs in such cases.

Illustrations.

(1) Upon the construction of a special Act the Court declined to make any order as to the costs of an application by vendors to have payment out of court of part of the purchase-money and investment of the remainder : *Ex parte Molyneux* (1845), 2 Coll. C. C. 273.

(2) The purchase-money of lands taken by the Midland Railway Co., under their Act, from a tenant in tail was paid into the bank. The tenant in tail barred the entail of the money and presented a petition for the payment of it :—*Held* by Knight Bruce, V.-C., following his own decision in *Ex parte Molyneux* (*ante*), that he had no power to order the company to pay the costs of the petition : *Ex parte Thoroton, In re Midland Counties Ry.* (1848), 17 L. J. Ch. 167.

(3) "I should be overruling *Ex parte Molyneux*, 2 Coll. C. C. 233, if I gave the costs in this case. . . . The operation of the Amalgamation Acts is simply this :—The company, knowing that the old Acts did not impose upon them the payment of all costs, inserted this clause [sects. 9, 10 of Amalgamation Act]. It is said that, although you are to pay the costs under the old Acts, yet the Amalgamation Act does not say you shall not pay other costs under the Lands Clauses Act. I think that would not be a sensible construction of the Act. I can only look to the old Act. It is said that the old Act does not authorise the payment of money out of court at all, but *Ex parte Molyneux* is very strong on account of Vice-Chancellor Knight Bruce's reluctance. The Court takes on itself the power of handing over the money to the owner, but, though the Court thought itself justified in doing that, it did not think itself justified in giving costs. The Manchester Act says it shall remain in court till dealt with in one of the following ways, &c. Therefore the Lands Clauses Act cannot apply to authorise its payment out of court, though I at first thought it might": *per* Wood, V.-C., in *In re Doncaster's Settled Estates and London and North-Western Ry.* (1855), 3 W. R. 635, n.

(4) Where purchase-money had been paid into court by a railway company and invested in stock:—*Held* that, upon the construction of the company's special Act, the Court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, notwithstanding that they might have been ordered under the Act to pay much larger costs had the petition prayed a reinvestment in land: *In re Land's Trust* (1858), 4 K. & J. 81.

(5) Where money had been paid into court under the B. and D. Railway Act:—*Held*, on the construction of the special Acts, that the Court had no power to order the company to pay the costs of obtaining a transfer to the person absolutely entitled, herein following *Ex parte Molyneux*, 2 Coll. C. C. 273: *In re Mauseley's Trust* (1858), 4 K. & J. 86, n.

(6) Where the special Act passed before the Lands Clauses Act authorised the Court to order the company to pay the costs of applications for payment in the case of dividends, but not in that of principal, the Court will not apportion the costs where an application for payment out of principal includes a small amount of dividends: *In re Metford* (1860), 6 Jur. (N.S.) 796.

(7) Where an Act passed before the Lands Clauses Act authorised payment out for investment in land, and made the company liable for the costs incurred, but did not deal with payment out to persons absolutely entitled:—*Held*, that the Court had jurisdiction to order payment out, but not to make the company pay the costs of the application: *In re Musgrave* (1860), 6 Jur. (N.S.) 797.

(8) A canal company took lands of which A. was tenant for life. By the company's Act the only costs they were directed to pay were those of reinvestment. On a petition for payment out of the fund representing the purchase-money:—*Held*, that the Court was not able, upon the principle of a general latent power to deal with costs, to go beyond the express enactments of a statute: *In re Macclesfield Canal Act*, *In re Ackers* (1863), 9 Jur. (N.S.) 224.

(9) The Court has no jurisdiction, except by express enactment, to make a company pay the costs of a petition for payment out, to persons becoming absolutely entitled, of moneys paid into the Court of Chancery or Exchequer in respect of lands taken by the company from persons under disability. So *held* by Stuart, V.-C., in *Ex parte Ecclesiastical Commissioners* (1865), 5 N. R. 483; followed in *In re Harrison's Estate*, *infra*.

(10) "The rule of the Court of Chancery in such cases is settled by the case of *Ex parte Molyneux* (1845), 2 Coll. 273, in which Vice-Chancellor Knight Bruce, feeling himself bound by previous decisions and deeply regretting that he was so bound, decided that, although the parties taking the land compulsorily were bound to pay the expense of taking the money out of court and investing it in other land, they were not bound to pay the expense of taking it out of court without investing it in other lands. That was followed by the present Lord Chancellor in *In re Land's Trusts*, 4 K. & J. 81. That was a case under an Act which was passed before the Lands Clauses Act, 1845, and the same question arose; the Lord Chancellor, quite concurring in all that Vice-Chancellor Knight Bruce had said as to the ungracious character of the refusal of the company to pay the costs, when they might confessedly have been compelled to pay such far larger costs had the petition been for a reinvestment in land, decided with extreme reluctance that he was bound by the cases, especially *Ex parte Molyneux*, to decide in their favour. Then in another case, reported in a note to *In re Land's Trusts*, the Lord Chancellor, after taking time to consider the case of *In re Robertson* (1857), 23 Beav. 433, which is an authority the other way, decided that he was bound by the authorities, especially *Ex parte Molyneux*, to hold that the Court had no power to order the company to pay the costs of an absolute transfer": *per* Malins, V.-C., in *In re Harrison's Estate* (1870), L. R. 10 Eq. at p. 536.

(11) The L. Railway Co. were incorporated by an Act prior to the Lands Clauses Act, which provided that the Court should have power to "order the expenses of all purchases," including "the necessary costs and charges of obtaining such order," to be paid by the company. A petition was presented for investment and payment of the dividends of a fund in the Court of Exchequer, representing purchase-money of lands, to be paid to the tenant for life. This was granted and the costs were ordered to be paid by the company. By 5 Vict. c. 5, the fund was transferred to the Court of Chancery. On a petition for payment out:—*Held*, that the company had not to pay the costs: *In re Williams' Estate* (1871), L. R. 12 Eq. 488.

NOTE.—Upon the construction of the company's special Act, costs of payment out to parties absolutely entitled may be given against the company.

Illustrations to Note.

(1) A railway company acquired lands under statutory powers and paid the value thereof into court. Part of the purchase-money was directed to be left in court to await the decision of contested claims. The company was directed, under sect. 48 of their special Act, to pay the costs of the application of the person rightly entitled to have the money paid out to him: *Ex parte Gardiner, In re Eastern Counties Ry.* (1843), 3 Rail. Cas. 117.

(2) A tenant in tail, upon attaining his majority, barred the entail in certain moneys, the proceeds of land taken under statutory powers during his minority, and presented a petition to the Court for the payment to him of the purchase-money and of the costs, charges, and expenses incident to the application. The Court made the order as prayed: *Ex parte Marshall, In re Great Western Ry.* (1845), 4 Rail. Cas. 58.

(3) Under the provisions of their special Act the N. M. Railway Co. was *held* bound to pay the costs of the parties applying for payment out of court of a sum of money which had been paid in for land taken by the company and invested: *Ex parte Slater's Devises, In re North Midland Ry.* (1849), 5 Rail. Cas. 700.

(4) A sum of money was paid into court upon the purchase of land by a railway company. It was argued that where the money was to be paid out of court and not to be reinvested, the company was not liable to pay the costs of the application to the Court:—*Held*, that the obvious meaning of the special Act was that the company should pay all the costs, including the costs of the application to the Court for payment: *In re Tuft's Estate* (1856), 2 Jur. (N.S.) 131.

(5) In a transferred Exchequer case the Court was authorised by the Act only to order the costs of reinvestment of the purchase-money of lands taken under statutory powers by a corporation. Parties, having become absolutely entitled, applied for payment to them out of court of the money instead of reinvesting it:—*Held*, that the corporation must pay the costs: *In re Tiverton Market Act* (1858), 26 Beav. 239; approved, but not followed, in *In re Harrison's Estate* (1870), L. R. 10 Eq. 532.

(6) Upon a petition for the transfer of purchase-money paid into court by the Ecclesiastical Commissioners, by whom certain lands had been taken, Stuart, V.-C., following his own decision in *In re Spitalfields Schools* (1870), 22 L. T. 569, ordered the costs of all parties to be paid by the Commissioners: *Clark v. Johnson* (1870), 22 L. T. 570.

(c) Where there is an interim investment on a petition by a person absolutely entitled for payment out, the promoters must pay brokerage on the sale of the investment.

Illustration.

A fund in court represented purchase-money of land taken under the Lands Clauses Act. It was proposed to sell the stock and reinvest the money in land :—*Held*, that the body or company who paid the money in must pay the broker's charges on the sale of the stock : *In re Magdalen College, Oxford* (1901), 70 L. J. Ch. 821.

- (d) Promoters must pay the costs of payment out to trustees for the purposes of the Settled Land Acts, but not the costs of obtaining an order for the appointment of such trustees.

Illustrations.

(1) Four funds in court represented the purchase-money of lands compulsorily taken. Orders had been made for payment of the dividends to H., who was absolutely entitled, in one case and tenant for life in the others. On a petition for payment out to trustees under the Settled Land Act :—*Held*, that in the first case the company was only liable to pay the costs of advertisements, but in the other cases the company must pay the costs of the petition : *Ex parte Harborton (Viscountess)*, *In re Belfast Corporation* (1893), 31 L. R. Ir. 258.

(2) H. was tenant for life of land under a settlement of 1881. Under a settlement of 1850 the land was subject to charges. Both deeds contained powers of sale, but the trustees were different. Part of the land was taken under the Lands Clauses Act, and the purchase-money was paid into court. H. obtained an order in the matter of the estate appointing the trustees of the deed of 1881 trustees under the Settled Land Act, 1882, of the compound settlement. On petition for payment out to these trustees :—*Held*, that the company were not liable for the costs of this appointment of trustees : *Ex parte Harlech (Baron)*, *In re Waterford and Limerick Ry.*, [1896] 1 I. R. 507.

- (e) If a power of attorney is necessary to enable persons to receive the money, the promoters must bear the costs of the same.

Illustrations.

(1) Part of the money which had been paid into court for land taken belonged to persons resident abroad, and it was necessary that a power of attorney should be granted to enable them to receive the money :—*Held*, that the costs thereof must be paid by the company : *In re Godley* (1847), 10 Ir. Eq. R. 222.

(2) A local authority took land belonging to K., and the sum of 385*l.* was awarded in respect thereof. After the date of the award K. died in Australia, having by his will given his property in trust for sale for the benefit of an Australian charity. Administration of the estate, with the will annexed, was granted in Australia. The sum of 385*l.* was paid into court, and administration of K.'s estate, with the will annexed, was granted to A. in Ireland, he being the person duly authorised to collect K.'s property and assets there. A. paid estate duty on the unsold real estate of K. on the fund in court representing lands taken, and on K.'s book debts. On A.'s application the money in court was paid out to him and the local authority ordered to pay all proper costs :—*Held*, that the costs of the power of attorney from the Australian administrator, the costs of the grant of administration in Ireland, and that part of the estate duty which had been paid in respect of the lands taken were payable by the local authority : *Ex parte Lurgan District Council, In re Kearns*, [1902] 1 I. R. 157.

- (f) Similarly, if letters of administration must be taken out before money can be paid, the promoters must bear the costs thereof.

Illustrations.

(1) Land subject to leases was taken by a railway company and the purchase-money paid into court. Persons claiming under the marriage settlement of their father, then deceased, applied for payment out, but the Court decided that other children, then dead, and of whom there were no personal representatives, had taken vested interests and declined to pay out the fund until administration had been taken out. One of the applicants having taken out letters of administration and obtained payment of the fund :—*Held*, that the company must bear the costs of obtaining the letters of administration : *Ex parte Kelly, In re Dublin Junction Rys.* (1893), 31 L. R. Ir. 137.

(2) Leaseholds which had belonged to J. R. were taken by a railway company under their compulsory powers. J. R., who was then dead, bequeathed them to his wife and six children “share and share alike, the share of any individual dying to be equally divided amongst the survivors.” No claim was made on behalf of the legatees for several years until E. R., the surviving legatee, lodged an abstract of title with the company. Not being satisfied with the title, the company lodged the purchase-money and interest in court. E. R. applied for payment out. The Court directed payment to E. R. of her share and the shares of the six deceased legatees to be placed to separate credits, and ordered the company to pay E. R. the costs of and incident to the application, order, and proceedings thereunder, and all costs, charges and expenses properly payable under the Lands Clauses Act. E. R. then took out administration to each of the deceased legatees and obtained payment of their shares :—*Held*, that the costs of taking out these administrations were properly payable by the company : *In re Midland Great Western (Ireland) Ry., Ex parte Rorke*, [1894] 1 I. R. 146.

(3) A railway company took leaseholds of which A. was tenant for life under a will and paid the purchase-money into court. On the death of the tenant for life, the fund became divisible into eleven shares ; the executors to the testator and all the original beneficiaries were dead. Administration was taken out of the testator's estate (*de bonis non*), and to the deceased beneficiaries. On petition for payment out :—*Held*, that the company must pay the costs of obtaining administration to the beneficiaries, but not of the testator : *In re Lloyd and North London Ry. (City Branch) Act*, 1861, [1896] 2 Ch. 397.

(4) *Ex parte Lurgan District Council, In re Kearns*, [1902] 1 I. R. 157, *ante*, p. 533. See also sect. 82, *post*, p. 550.

- (g) The promoters are liable to pay the costs of an application for the transfer of the purchase-money to the account of another suit.

Illustrations.

(1) One of several persons entitled to a fund which had been paid into court by a railway company for land taken petitioned that his share might be transferred to the credit of a cause instituted for the administration of the estate. The petition was served upon the other persons entitled with the petitioner :—*Held*, that the Court could direct the company to pay the costs of a transfer from one account to another : *Melling v. Bird* (1853), 22 L. J. Ch. 599.

(2) The purchase-money of land taken was paid into court and invested. A petition was afterwards presented for the transfer of the account to another account :—*Held*, that

this must be deemed a petition for payment out, and therefore the body which had taken the land must pay the costs of the petition: *In re Bristol Free Grammar School* (1878), 47 L. J. Ch. 317.

- (h) If charity lands are taken the promoters must pay the costs of an application for payment out to trustees under a new scheme, but not the costs of settling a new scheme or for the sanction of it.

Illustrations.

(1) Lands belonging to a charity were taken under the Lands Clauses Act by a company, who paid the purchase-money into court. By a scheme sanctioned by the Charity Commissioners the charity was subsequently recast, with governors instead of trustees. The new governors petitioned for payment out of part of the fund and payment of the dividends of the remainder:—*Held* that, the devolution of interest having been occasioned by reconstruction (to which every charity is liable), the company were liable to pay the costs of the petition: *In re Shakespeare Walk School* (1879), 12 Ch. D. 178.

(2) Property belonging to the trustees of a voluntary school having been taken, it was *held* that the costs of settling a new scheme for the school were too remote to be “costs incurred in consequence of” the taking of land, regard being had to the proximity of board schools and the general circumstances of the neighbourhood, which would probably in any event have led to the reconstitution of the charity: *In re St. Paul's Schools, Finsbury* (1883), 48 L. T. 412.

(3) Land belonging to a large number of parochial charities was acquired by various public bodies and the purchase-money paid into court. The Charity Commissioners formulated a scheme and applied for the transfer of the moneys. This was ordered and the costs directed to be paid by certain of the public bodies concerned: *In re St. Alban's, Wood Street* (1891), 66 L. T. 51.

- (k) If a leasehold interest is taken the promoters must pay the costs of periodic sales of stock for the purpose of distribution (see *ante*, p. 444).

Illustrations.

(1) Where lands subject to a lease were taken for the purposes of a company, and the purchase-money was invested under the Lands Clauses Act, the company was ordered to pay the costs of the half-yearly sales of stock for the purposes of distribution: *In re Long's Estate* (1853), 1 W. R. 226.

(2) Purchase-money representing leasehold property taken was paid into court and an order made for half-yearly sales of a certain part of the stock in which the purchase-money had been invested, and for payment of the proceeds thereof, together with the dividends on the remaining stock and for taxation and payment of costs:—*Held*, that the taxing master might, without a fresh order, tax the costs of each periodical sale as it took place: *In re Edmunds* (1866), 35 L. J. Ch. 538.

- (l) If the landowner has wantonly put promoters to unnecessary cost (*e.g.*, by creating leaseholds after notice to treat), the Court may, on petition for payment out, disallow him his costs.

Illustration.

The M. Board of Works gave T. notice to treat in respect of houses, let to weekly tenants. T. gave all his tenants three years' leases. The tenants made claims which were

disallowed, but occasioned expense to the board. The board paid T.'s compensation in under sect. 76. T. petitioned for it to be paid out :—*Held*, that there was no jurisdiction to reimburse the board out of the fund ; nor was there jurisdiction to order T. to pay the costs of the board on the petition, but that there was jurisdiction to refuse T. costs of his petition : *Ex parte Tuppie, In re Marglebone Improvement Act, 1868* (1871), 19 W. R. 1058.

- (m) The promoters may be ordered to pay the costs of separate applications by persons entitled to aliquot parts of the fund.

Illustration.

A railway company acquired a part of settled lands and paid the purchase-money into court. It was *held* that the costs of separate petitions for payment out by persons severally entitled to aliquot portions of the fund were to be paid by the company : *In re Portadown, Dungannon and Omagh Junction Ry., Ex parte Young* (1867), I. R. 1 Eq. 293.

F. Costs of all proceedings, relating to orders, except such as are occasioned by litigation between adverse claimants.

- (a) If the purchase-money is paid into court solely owing to adverse claims having been made, although there is no litigation, the costs of payment in or of the petition for payment out will not be awarded against the promoters unless the promoters have been the cause of the dispute, in which case they must pay the costs.

Illustrations.

(1) In 1847 a railway company took land belonging to A. and paid the purchase-money into court. In 1853 A., having found suitable land for reinvestment, agreed to purchase the same, but before the purchase could be completed the vendor died intestate, leaving an infant heir. A bill in equity thus becoming necessary, and also a petition as to costs :—*Held* that, the costs of the suit being adverse litigation within sect. 80, the company was not bound to pay them, but was liable to pay the costs of all other proceedings and of the petition as to costs : *Armitage v. Askham* (1855), 1 Jur. (N.S.) 227.

(2) A railway company having purchased land of which J. was tenant for life, paid into court the purchase-money. The tenant for life then petitioned first for the investment of the money and afterwards for the transfer of the fund to himself and his mortgagees. Disputes had arisen between the tenant for life and certain incumbrancers, and, but for these, the later application would have been unnecessary :—*Held*, that the railway company were not liable to pay the costs of the later application : *In re Jolliffe* (1857), 3 Jur. (N.S.) 633.

(3) A railway company took two pieces of land under different Acts. The two pieces were the subject of a disputed title, and the company thereupon took conveyances from both disputants, having previously paid the purchase-money into court in two separate sums :—*Held*, that the company must pay the costs of all parties to two petitions for investment of the money, the costs of appearance of the claimant who was named as respondent to the petitions not being costs occasioned by litigation between adverse claimants : *In re Butterfield* (1861), 9 W. R. 805.

(4) A dock company took land to which there were adverse claims and paid the purchase-money into court. One of the claimants (*viz.*, the Crown) afterwards abandoned its claim, and a petition was then presented by the other for payment out of the money :—*Held* that,

the money having been paid into court through adverse claims having been made, although there had not been any litigation, the company was not liable to pay the costs of the paying-in or of the petition : *In re English* (1865), 13 W. R. 932.

(5) A railway company took a piece of land to which there were adverse claims by B. and the Duke of N. The company therefore paid the purchase-money into court. Afterwards B. abandoned his claim :—*Held*, that as, in fact, the company had been the cause of the dispute, it must pay the costs : *In re Norfolk's (Duke) Estates* (1874), 22 W. R. 817.

- (b) If money has been paid into court and is claimed by more than one person the promoters are liable to pay only one set of costs for investment or payment out—less any increase therein by reason of the adverse claims.

Illustrations.

(1) Under the Act 5 & 6 Vict. c. 62, the Commissioners of Woods and Forests are bound to pay the costs of a reference to ascertain the rights of parties to the purchase-money of premises purchased under the Act as expenses incidental to the purchase : *Ex parte Halloran, In re Woods Commissioners* (1845), 7 Ir. Eq. R. 487.

(2) A railway company took land and paid the purchase-money into court. There was a suit proceeding which made it necessary to present a petition in the matter of the company's Act and in the cause :—*Held*, that the company must pay only the costs occasioned by the petition being presented in the matter of the Act, and the costs of the petition were to be costs in the cause : *Hore v. Smith* (1849), 14 Jur. 55.

(3) Land subject to the trusts of a will was taken by a railway company and the purchase-money paid into court. Upon the death of the person entitled to a life interest a dispute arose among the persons claiming under the will upon petition for payment out of court :—*Held*, that the usual and correct form of order in such cases was to direct the company to pay the costs, with an express exception of the costs, if any, occasioned by litigation between adverse claimants : *In re Cant's Estate* (1859), 1 De G. F. & J. 153.

(4) C. petitioned for payment out of 2,200*l.*, which had been paid into court by a railway company, 1,500*l.* as purchase-money of C.'s leasehold interest, and 700*l.* for disturbance of trade. It appeared that C.'s leases were invalid :—*Held*, that the company were liable to pay the general costs of the petition, but not those of the lessors, which were expenses caused by "adverse litigation" : *Ex parte Cooper, In re North London Ry.* (1865), 13 W. R. 364.

(5) A testator, at the date of his death, was entitled to money in court which represented land taken by a railway company. He left a widow and an infant heir. A petition was presented by the widow for transfer of the fund, or if she should be considered not entitled to the fund, then for payment of the dividends during the minority of the infant heir to be applied for his benefit :—*Held*, that the order must be only for payment of dividends during the heir's minority, and that, there having been adverse claims on the petition, the railway company should pay only one set of costs : *Ex parte Yates* (1869), 20 L. T. 940.

(6) A petition was presented for the transfer to the petitioner of a sum of money paid into court by a railway company under the Lands Clauses Act ; and several claimants to the sum appeared. The Court, having decided that the petitioner was entitled to the whole sum, ordered the railway company to pay the costs of the petition and of the proceedings thereunder, except such costs as were occasioned by the litigation between the adverse claimants ; and further ordered the unsuccessful claimants to pay to the petitioner

such costs as the taxing master should find to have been occasioned by their adverse claims: *Ex parte Great Southern and Western Ry.* (1877), Ir. R. 11 Eq. 497.

(7) A burial board took certain land to which there were four adverse claims. Upon petition for payment out of the money in court:—*Held*, that the board was bound to pay only one set of costs, and that the rest must come out of the fund: *In re Catling's Estate* [1890] W. N. 75.

(8) A railway company took lands under their powers and lodged the money in court. On a petition for payment out, an affidavit was filed on behalf of the Crown claiming the land as foreshore and resisting the petition. The Court ruled in favour of the petitioners. It was *held* that this was a “proceeding” within sect. 2 of the Crown Suits Act, 1855 (18 & 19 Vict. c. 90), and that the Crown could be ordered to pay costs: *In re Dublin, Wicklow, and Wexford Ry., Ex parte Jordan* (1892), 31 L. R. Ir. 1.

- (c) The term “litigation between adverse claimants” is intended to apply to such a case as where ejectment has been brought by one claimant against another.

Illustration.

A railway company agreed to purchase of C. Palmer a piece of land for 260*l*. Owing to a claim by W. Padwick the money was paid into court and invested, and the dividends were ordered to be paid to C. and B. A petition was presented by Palmer with C. and B. for payment out, W. Padwick appearing and consenting:—*Held*, that this was not a case where the costs were occasioned by adverse litigation between adverse claimants, the exception in the Act being intended to apply to such a case as where ejectment had been brought by one claimant against another: *Ex parte Palmer* (1849), 13 Jur. 781.

- (d) If the adverse claims be by two co-heirs and they join in petitioning for payment out, the promoters must pay the costs, including costs of proving pedigree.

Illustration.

A railway company took land which was subject to adverse claims by A. and B. as coheirs, deriving their title from two sisters, who had inherited as coparceners. The two coheirs petitioned for payment out of the purchase-money:—*Held*, that this was a proper course to take, and the company must therefore pay the costs, but not the costs of affidavits by the claimants in answer to claims made with respect to persons who answered advertisements for heirs. The costs of proving the pedigree of the two rightful heirs were, however, allowed: *In re Spooner's Estate* (1854), 1 K. & J. 220.

- (e) Where the parties found entitled to the money are numerous and an inquiry in chambers is necessary to ascertain their identity and their respective shares, the costs must be borne by the promoters.

Illustrations.

(1) C. obtained an agreement for a lease of some warehouses, which was deposited with his solicitor, who afterwards agreed to advance 300*l*. to C. for the repair of the premises upon his signing a memorandum charging them with that sum, and with all further

advances not exceeding 500*l.* The property was afterwards taken by a local authority, acting under statutory powers, and, owing to questions between C. and his solicitor as to the amount due upon the security, and also in consequence of notice of a judgment debt due by C., the purchase-money was paid into court, and upon a petition by C. asking for an account, and that 500*l.* might be set apart to answer what should be found due from him to his solicitor, and that the surplus, after payment of the judgment debt, might be paid to C.:—*Held*, that the amount of debt between C. and his solicitor must be ascertained by the master; that the local authority need not attend, but that it must pay the costs of this petition, but not of the affidavits made with respect to the claims of the parties: *Ex parte Collins* (1850), 19 L. J. Ch. 244.

(2) Land was taken by a railway company and the money paid into court. The parties found to be entitled to the money were very numerous, and some of them were resident abroad, so that there was considerable difficulty in ascertaining their identity and the amounts of their respective shares, and an inquiry in chambers became essential:—*Held*, that the company must pay the costs thus incurred: *In re Singleton* (1863), 9 Jur. (N.S.) 941 (see *Ex parte Great Southern and Western Ry.*, ante, p. 538).

(3) The Courts of Justice Commissioners, having taken a house of which B. was the lessee, paid into court the valuation in the names of all parties having a claim upon the money. Several persons took out summonses for obtaining the amounts they claimed, and the question was whether there had been adverse litigation so as to exempt the Commissioners from the necessity of paying the costs of the payment into court and later proceedings. The Court left it to the taxing master to find whether there had been adverse litigation, and, if so, what costs had been incurred thereby: *In re Courts of Justice Commissioners* [1868] W. N. 124.

- (f) If the title depends on the construction of a will, the promoters must pay costs of the construction by the Court. But if other parties appear and the costs of construction are thereby increased, the promoters will have to pay only the one set of costs.

Illustrations.

(1) A sum of money having been paid into court by a railway company, some of the persons entitled to it presented their petition for payment out. Counsel for other parties who appeared was requested by the Court to argue a question of construction of a will forming part of the title to the land:—*Held* that, if the costs had not been thereby increased, the company must pay the whole amount: *In re Tookey's Trust* (1852), 16 Jur. 708.

(2) A railway company agreed with certain trustees of a will for the purchase of land. The title of the trustees depended upon the construction of a will, to which the company objected and paid the purchase-money into court. The question of construction having been argued by the parties interested on a petition for investment and payment of dividends:—*Held*, that the company was bound to pay only one set of costs: *Ex parte Styant, In re Mid-Kent Ry. Act* (1859), 1 Johns. 387.

(3) Land which was subject to the trusts of a will was taken by a corporation and the purchase-money paid into court:—*Held*, that the costs of determining the construction of a doubtful devise in the will were not "costs of litigation": *In re Gregson* (1864), 2 H. & M. 504.

(4) When it is doubtful under a testator's will whether a good title to premises taken by a company under statutory powers can be made out, and there is no wilful default or

delay on the part of the owner, the Court being called upon to put a construction upon such a will, the company, on the application of the owner to obtain out of court the purchase-money agreed to be paid for the land, was ordered to pay the costs according to their Act : *In re Woodburn's Trust* (1865), 13 L. T. 237.

- (g) If it is necessary to obtain the construction of a will or otherwise to determine the rights of the parties interested, the promoters must pay the costs.

Illustrations.

(1) When the costs incurred have been for administration as distinguished from adverse litigation, as, *e.g.*, obtaining the construction of a will on which the rights to a fund depend, they must be borne by the company : *In re Hinks' Estate* (1853), 2 W. R. 108.

(2) A railway company took land belonging to a devisee for life with remainder to the testator's heirs, and paid the purchase-money into court :—*Held*, that the company must pay (*inter alia*) the costs of investigating the title of persons who claimed to be heirs, in answer to the advertisements issued by order of the Court, except such costs as were caused by affidavits of the petitioners, in opposition to such claims which were "occasioned by adverse litigation" within sect. 80 : *In re Spooner's Estate* (1854), 1 K. & J. 220.

(3) Part of certain land which was subject to the trusts of a will was taken by a railway company and the purchase-money paid into court. It then became necessary (upon petition) for the Court to construe the will and determine the rights of the persons interested :—*Held*, that the costs of the petition must be paid by the railway company : *In re Noake's Will* (1880), 28 W. R. 762.

(4) Leasehold property which was subject to the trusts of a settlement having been taken by a corporation and the purchase-money paid into court, it became necessary for the Court to decide how the fund was to be distributed :—*Held*, that the costs thereby incurred were not costs of litigation between adverse claimants, and should have been paid by the corporation. They were simply costs arising in the course of administering the purchase-money : *Askew v. Woodhead* (1880), 14 Ch. D. 27.

NOTE.—In a suit by a railway company for specific performance against the infant devisees of a vendor who had died before executing the conveyance of lands taken from him during his life by the company under their compulsory powers, each party bore his own costs : *London and South-Western Ry. v. Bridger* (1864), 4 N. R. 261. "The policy of requiring the railway company to pay the costs of all necessary parties was confined to petitions presented under the Lands Clauses Consolidation Act ; that the present case corresponded to the ordinary one of a vendor dying intestate after agreement to sell, and leaving an infant heir ; where the costs of a suit for specific performance were not thrown upon the company unless the company was in default. No costs, therefore, would be given on either side, provided that the suit was necessary" : *per* Wood, V.-C., at p. 262, *ib.* (see now sect. 4 of the Conveyancing Act, 1881).

VI. Apportionment of costs where promoters of two or more undertakings have paid in purchase-money.

(a) Where a petition is for payment out, the several promoters must bear the costs equally, and where the petition is for investment the general costs are borne equally, except the *ad valorem* stamp duty on the

assignment or conveyance, and except also the surveyor's fee (when the investment is in land), which are to be paid rateably in proportion to the amount contributed by each undertaking. If there are special circumstances the rule that the general costs must be contributed equally may be departed from.

Illustrations.

(1) The trustees of two charities, being identical, purchased an estate on behalf of the two charities out of the two sums paid into court by two railway companies for parts of the charity lands taken separately by them. The proceedings to complete and apportion the estate were consolidated :—*Held*, that the costs of the joint proceedings were payable by the railway companies equally, and not in proportion to the values : *London, Brighton and South Coast Ry. v. Shropshire Union Ry.* (1856), 23 Beav. 605.

(2) A bishop petitioned to have money which had been paid into court by several railway companies for lands taken from the see applied in buying up a lease of other lands belonging to the see :—*Held*, that the costs ought to be borne by the companies in equal shares, except the cost of the *ad valorem* stamp on the assignment, which ought to be borne by them rateably according to the amounts which they contributed respectively to the purchase-money. Form of Order settled : *Ex parte London (Bishop)* (1860), 2 De G. F. & J. 14.

(3) "In my judgment the rule laid down in *Ex parte Bishop of London (ante)* is a beneficial rule, and one, upon the whole, just and not to be lightly disturbed, especially as it has been adopted since it was originally laid down. There is not here any circumstance of extreme hardship to render consideration necessary, whether or not the rule should be in the present case held inapplicable": *per* Turner, L.J., in *In re Byron* (1863), 1 De G. J. & S. 358 ; same point, *In re Merton College* (1863), 1 De G. J. & S. 361.

(4) Three railway companies took under compulsory powers parts of an estate ; the united compensation was invested in one purchase :—*Held*, that each of the companies ought to bear an equal share of the costs of reinvestment, and that two of them which had been amalgamated would have to pay two-thirds of such costs : *In re Maryport, &c., Ry., Ex parte Lonsdale (Earl)* (1863), 32 Beav. 397.

(5) Two railway companies took land belonging to a college and paid the purchase-money into court. Upon petition to invest the whole of one sum and part of the other in a leasehold brickfield, with 977 years to run, adjoining a college living, and thereby to avoid the nuisance :—*Held*, that the costs must be paid by the two companies equally : *Ex parte Trinity College, Cambridge* (1868), 18 L. T. 849.

(6) Land having been taken by several public bodies and the purchase-money paid into court :—*Held*, upon a petition for reinvestment of the money, that the costs of the petition must be borne in equal shares, but the surveyor's fee must be borne by the several bodies rateably according to the amount of the money paid by each : *Ex parte London Corporation* (1868), L. R. 5 Eq. 418.

(7) The amount of the surveyor's fee allowed with respect to land taken is so much per cent. (5 per cent. to $\frac{1}{2}$ per cent.) according to the amount of the purchase-money : *Att.-Gen. v. Drapers' Co.* (1869), L. R. 9 Eq. 69.

(8) Land, part of a settled estate, was taken by two public bodies and the purchase-money paid into court. Upon a petition for reinvestment of the money in buildings :—*Held*, that the costs of the hearing of the petition must be paid in equal shares by the two

public bodies, and the costs of an appeal of the petitioner, of the remaindermen, and of the trustees out of the fund : *In re Leigh's Estate* (1871), L. R. 6 Ch. 887.

(9) Six pieces of land belonging to a college having been taken by four different railway companies, the undertakings of three of which afterwards became united :—*Held*, that the costs of a joint permanent investment of the purchase-money must be borne in equal shares by the subsisting companies: *Ex parte Corpus Christi College, Oxford* (1871), L. R. 13 Eq. 334.

(10) Parts of the same estate were taken by four different companies, three of which were afterwards amalgamated :—*Held*, that the costs of a petition for payment out of the purchase-moneys must be borne by the existing companies in equal shares : *Ex parte Gaskell, In re Manchester and Leeds Ry.* (1876), 2 Ch. D. 360. Jessel, M.R., said at p. 361 :—“ It was decided in *Ex parte Bishop of London (ante)* that in such cases the costs are to be borne equally by the companies, unless there are special circumstances. The petition is for payment out of the fund in court, and it does not appear to me that where that is the object of the petition, there can be any special circumstances. Where the petition is for investment in land I can readily understand that there may be ; it may make a very great difference whether 10,000*l.* or 100*l.* is to be reinvested as to the costs of investigating the title of the land purchased, and the conveyance, &c. But where the petition asks simply for payment out, the costs are exactly the same, whether the fund is 10,000*l.* or 100*l.* I cannot, therefore, accede to Mr. Speed's argument, that the costs should be apportioned according to the amount of the funds paid in by the companies ” : *ib.*

(b) It would seem that inequality of the amounts contributed by the different undertakings is not a ground for departing from the above rule, unless that inequality is very great.

Illustrations.

(1) A petition was presented for the investment of 320*l.*, 718*l.*, and 65*l.*, representing purchase-money of lands taken by three separate companies. Kindersley, V.-C., directed the costs of the petition to be apportioned among the three companies according to the amount of the purchase-moneys : *Ex parte St. Thomas' Hospital* (1859), 7 W. R. 425.

(2) Where two railway companies had taken land and paid the purchase-money, of unequal amounts, into court, and an order for reinvestment had been made containing the provision that the costs of the reinvestment should be apportioned between the two companies in the proportion which each sum paid in bore to the total sum :—*Held*, that the order was correct, and that the costs of the unsuccessful application for payment in equal shares must be borne by the company making it : *Ex parte Christchurch* (1861), 9 W. R. 474.

(3) Sums of very unequal amount were paid into court as the value of land taken by a number of public bodies. Upon a petition for the reinvestment of these moneys :—*Held* that the mere inequality of such sums, however great, was not a ground for departing, from the rule as to the apportionment of costs laid down in the *Bishop of London's Case (ante)*, nor yet that only a part of the fund paid in by any particular company is proposed to be reinvested : *Ex parte Christ's Hospital* (1864), 2 H. & M. 166.

(4) The rule that the costs of a reinvestment in land of funds paid into court under the Lands Clauses Act by different bodies as the compensation money for land taken are to be borne equally by the different bodies does not apply where there is any considerable inequality in the amounts of the different funds, but the costs will, in that case, be apportioned rateably among the different bodies : *per* Malins, V.-C., in *Ex parte St. Bartholomew's Hospital* (1875), L. R. 20 Eq. 369.

NOTE.—The amounts in question in the above case varied from 1,295*l.* to 18,000*l.*

(5) Upon a petition for the reinvestment in land of a sum made up of four several amounts, varying from 490*l.* Consols to 1,797*l.* Consols, paid into court to the credit of the petitioners by four several respondents for the purchase-money of land taken under statutory powers, the costs of the reinvestment were ordered to be paid by the respondents in equal parts : *Ex parte Christ's Hospital* (1879), 27 W. R. 458.

(6) Land belonging to a charity was taken by four different public bodies and the purchase-moneys paid into court. There was great inequality in the amounts so paid in, and a scale fee was payable upon the purchases. Chitty, J., directed the costs of reinvestment and the *ad valorem* stamp duty and the surveyor's fee to be paid to be apportioned rateably among the four bodies : *In re Bishopsgate Foundation*, [1894] 1 Ch. 185.

(c) If some of the companies are not liable under sect. 80 for costs they do not pay any, and the remaining companies who are liable have to pay the costs in the same proportion as if all were liable.

Illustrations.

(1) Where a petition was presented to pay out a fund representing purchase-money of lands taken by two public bodies (who were not liable for costs), eleven companies whose Acts had either incorporated the Lands Clauses Act or contained provisions similar to sect. 80, and four companies who were only liable for costs of reinvestment in land :—*Held*, that the eleven companies must each pay one-seventeenth of the costs : *Ex parte Ecclesiastical Commissioners* (1865), 11 Jur. (N.S.) 461.

(2) A sum of 20,000*l.*, part of a larger sum of 25,000*l.*, was standing in court to the account of a charity. Of this amount 2,000*l.* had been paid in by the L. C. and D. Railway Co., 19,000*l.* by the M. Railway Co., and the balance (4,000*l.*) by the Crown. The Crown not being liable for any costs of reinvestment, the question was how the costs should be borne as between the companies and the charity :—*Held*, that the costs must be paid by the companies, save so far as they had been increased by the purchase-money exceeding that portion of it which consisted of money paid in by the companies : *Att. Gen. v. Rochester Corporation* (1867), 15 W. R. 765.

(d) If, however, one railway company leases its line to the others, that has not the same effect as amalgamation, and the lessor company is liable to pay its proportion of the costs.

Illustration.

Land was taken by three railway companies from the same owner. Afterwards one of the companies leased its line to one of the others :—*Held*, that each company must bear one-third of the costs of the reinvestment, with a proportionate part of the *ad valorem* stamp : *In re Carlisle and Sillith Ry.* (1863), 33 Beav. 253.

VII. Procedure.

(a) Where under the Rules of the Supreme Court an application which might be made by summons is made by petition, the costs only of a summons will be allowed unless proceeding by petition is cheaper and more expeditious than by summons, in which case the costs of a

petition will not be disallowed. This subject is fully considered at p. 414, *ante*.

(b) Applications to vary orders made on petition should be by petition.

Illustrations.

(1) A company had paid in the purchase-money of lands of which A. was tenant for life. A. obtained an order for payment of the dividends on the fund. A. died, and two dividends and part of a third were then due. The guardian of an infant tenant in tail came into possession :—*Held*, that executors of A. might have got the two and the proportionate share of the third dividend on summons, but that the infant's share of the dividend and future dividends could only be obtained by the guardian, on petition of which the company must pay the costs : *In re Jolliffe's Estate* (1870), L. R. 9 Eq. 668. This case was decided under the old practice (see now R. S. C. Ord. LV. rule 2 (7)).

(2) In August, 1893, an order was made upon the petition of persons interested under a settlement permitting the investment of moneys paid into court for land taken by the M. Board of Works in constructing sewers for developing the land taken as a building estate. It was afterwards found that the cost of the works would exceed the estimate, and a supplemental petition was therefore presented asking that the outlay might be sanctioned and the necessary money raised out of the fund in court :—*Held* that, as the application was, in effect, to vary an order made on petition, it could not properly be made by summons, and therefore the costs of both petitions ought to be allowed : *In re Sanders* (1894), 70 L. T. 755.

(c) Where different lands under the same settlement or settlements to the same uses have been taken by different companies and the purchase-moneys paid into court and the total amount is to be dealt with, or where a person is entitled to a sum of money paid in by a company partly under a will and partly under a settlement, the costs of only one application will be allowed, even although the purchase-moneys have been dealt with by different branches of the Court.

Illustrations.

(1) B. was tenant for life of lands in Dorset, Devon and Cornwall which had been taken by three railway companies. The purchase-money had been duly paid into court, and B. now presented three petitions for payment of the dividends upon each of the three funds :—*Held*, that the petitioner ought not to have the costs of three preparations of the draft petition : *In re Broke's (Lord) Estate* (1863), 11 W. R. 505.

(2) Two portions of a settled estate belonging to G. L. were taken under statutory powers by two different public bodies, and the purchase-money was paid into court and dealt with by different branches of the Court. The tenant for life was desirous of investing the two funds together in the purchase of land, and presented petitions in two different courts :—*Held*, that the costs of one petition only could be allowed under the Lands Clauses Act : *In re Gore-Langton's Settled Estates* (1875), L. R. 10 Ch. 328.

(3) Where a fund in court represented the purchase-money of two properties which devolved on A., as tenant for life and after to the same remaindermen, but under different instruments, with separate trustees, and two petitions were presented :—*Held*, that only

one petition should have been presented, and that the company were to pay the costs of one petition, five guineas only towards the costs of the second, and three guineas for the costs of each set of trustees: *In re Pattison's Settled Estates* (1876), 4 Ch. D. 207.

(d) If portions of a settled estate are taken by three companies, two of which afterwards amalgamate, the costs of two, not three, applications for payment out in discharge of an incumbrance will be allowed.

Illustration.

Portions of a settled estate were taken by three railway companies and the purchase-money paid into court. Two of the companies afterwards became amalgamated. Three motions for payment out in discharge of an incumbrance were served on behalf of the tenant for life in the three matters and the motions were concentrated into one branch of the Chancery Court:—*Held*, that only the costs of two motions ought to be paid by the companies: *Ex parte Dillon (Lord)*, *In re Midland Great Western Ry.* (1881), 9 L. R. Ir. 16.

(e) If several persons are entitled to part shares of purchase-moneys, each part-owner *bonâ fide* employing a separate solicitor is entitled to the costs of obtaining his share of the money.

Illustration.

N. by her will devised lands to trustees for A. during her life, and thereafter for the children of A. as tenants in common. Two separate parcels of the lands were taken by a railway company, and, A. being dead, seven petitions were presented seeking transfers of the money in court:—*Held*, that each part-owner *bonâ fide* employing a separate solicitor was entitled to the costs of obtaining the share of the money, but two or more of such part-owners employing the same solicitor were, in the absence of special circumstances, not entitled to more than one set of costs: *In re Nicholls' Trust Estates* (1866), 35 L. J. Ch. 516.

(f) Similarly, if such persons, being beneficiaries, are respondents, they are entitled to the costs of appearance.

Illustrations.

(1) A petition was presented for payment out of purchase-money to persons having charges on the land taken by a railway company, upon which petition four coheirresses and the persons having the charges were served and appeared separately. The company was ordered to pay the costs. But where a sum was payable to E. only as the party to receive it, by arrangement, for another party, the costs of E. were not allowed as against the company: *In re Braye (Baroness)* (1863), 11 W. R. 333.

(2) A railway company took lands held in trust with a power of sale for a testator's children and grandchildren in various portions, and paid the purchase-money into court. The surviving trustee and some of the *cestui que trusts* presented a petition for payment out, to which infant *cestui que trusts* and one who was absolutely entitled were made respondents and appeared by four separate counsel:—*Held*, that the company must pay the costs of all the appearances except that of the defendant absolutely entitled, who had originally joined in the petition and had been made a respondent for no apparent reason: *In re Long's Trusts* (1864), 33 L. J. Ch. 620.

(g) If a second Act dissolves a company created under a special Act, the rights against it may be transferred to a new company created by the second Act.

Illustration.

"But it appears that by a subsequent Act this company, so far as keeping them in existence as a company is concerned, was dissolved. They had no right to become proprietors of land afterwards; nor could any trustees of any charity be authorised to convey any land to them after the company was dissolved and the Act repealed. A new authority must arise to justify such a proceeding; and, as might have been expected, inasmuch as the object of the 9 & 10 Vict. c. cciv. was to carry into effect the original objects of 3 & 4 Will. IV. c. xxxvi., in combination with other objects, it adopted certain things that had been done under the authority of the 3 & 4 Will. IV. c. xxxvi., and created a new authority for a new company to take the benefit of what had been done, and giving to other parties such a benefit as could arise to them under contracts made with that first company": *per* Lord Truro, C., in *Ex parte Eton College* (1850), 20 L. J. Ch. at p. 6.

(h) Upon an application for investment and payment of dividends the promoters should not be joined as co-petitioners, but served as respondents in the usual way, but in some cases service on the promoters has been dispensed with.

Illustrations.

(1) A local authority took certain property belonging to a lunatic and paid the value into court. The Act under which the lands had been taken contained no provision as to the costs of reinvestment. A petition by the committees of the lunatic for the investment of the purchase-money was served upon the local authority, and the authority appeared by counsel, who asked for the costs of appearance. This, however, was refused: *Ex parte Exeter Corporation, In re Sercombe* (1844), 8 Jur. 653.

(2) The purchase-money of a leasehold interest purchased by a railway company was paid into court to an account "*Ex parte* the company, the account of the two lessees," and the dividends were ordered to be paid to one lessee and the executrix of the other. The executrix married:—*Held* that, on a petition for payment of the dividends to the husband and the other lessee, it was unnecessary to serve the company, and that, service having been made, the petitioners must pay the company's costs: *Ex parte Hordern, In re Grand Junction Ry.* (1848), 2 De G. & Sm. 263.

(3) Glebe lands belonging to a rectory having been taken by a railway company and the money paid into court, a petition was presented by the rector for the investment of the money:—*Held*, that it was unnecessary to serve the company with notice of the petition: *Ex parte Rector of Kirkby Overblow, In re Leeds and Thirsk Ry.* (1850), 19 L. J. Ch. 329.

(4) A petition was presented for the investment and payment of dividends arising from money paid into court for land taken. The promoters, a railway company, were joined as co-petitioners to save expense:—*Held*, that they ought to have been made respondents and served in the usual way: *In re Edward VI. Almshouses* (1868), 37 L. J. Ch. 664.

(k) If persons who ought to join in the petition appear as respondents, the promoters will not have to pay their costs.

Illustration.

Certain trustees and remaindermen of a settled estate, a portion of which had been taken by a railway company, having appeared as respondents instead of joining in the petition :—*Held*, that the company ought not to be ordered to pay their costs : *Wilson v. Foster, In re Lancashire and Yorkshire Ry.* (1859), 26 Beav. 398.

(l) Applications under the Trustee Relief Acts had to be by petition, but by the Trustee Act, 1893, they may be by petition or motion.

Illustration.

A judge in chambers has no power, under sect. 26 of the Act 15 & 16 Vict. c. 80 (repealed by 46 & 47 Vict. c. 49, s. 3), to entertain applications with respect to funds paid into court under the Trustee Relief Acts. Such applications must be upon a petition presented to the Court : *In re Hodges* (1855), 4 De G. M. & G. 491.

(m) What may be included in one order.

Illustration.

The Court will not by one order direct a reference as to the propriety of a proposed reinvestment, and as to title, and for the completion of the purchase by payment to the vendors, and for taxation and payment of costs. After the master has approved of the title and settled the conveyance, the matter must come again before the Court for approval and further directions : *Ex parte Duckle* (1852), 16 Jur. 511.

(n) Application to same branch of the Court.

Illustration.

The rule which requires applications to be made in the same branch of the court was treated as not applying to an application for the outlay upon farm buildings of part of a sum paid into court by a railway company for the purchase of land belonging to a charity : *Ex parte Hayter* (1862), 10 W. R. 557.

VIII. Form of order.**“Costs under the Act.”***Illustration.*

Hereditaments were taken by a corporation under statutory powers and the purchase-money was paid into court. Upon a petition praying that the costs of the purchase, &c., including all reasonable charges, &c., relating thereto, might be taxed and paid by the corporation, the only order made was for “costs according to the Act” : *Ex parte St. James' Garlickhithe (Rector), In re Hayward* (1863), 9 Jur. (N.S.) 1222.

Conveyances.

And with respect to the Conveyances of Lands, be it enacted as follows :

Form of
Conveyances. **81.** Conveyances of Lands to be purchased under the Provisions of this or the Special Act, or any Act incorporated therewith, may be according to the Forms in the Schedules (A.) and (B.) respectively to this Act

annexed, or as near thereto as the Circumstances of the Case will admit, or by Deed in any other Form which the Promoters of the Undertaking may think fit ; and all Conveyances made according to the Forms in the said Schedules or as near thereto as the Circumstances of the Case will admit shall be effectual to vest the Lands thereby conveyed in the Promoters of the Undertaking, and shall operate to merge all Terms of Years attendant by express Declaration, or by Construction of Law, on the Estate or Interest so thereby conveyed, and to bar and to destroy all such Estates Tail, and all other Estates, Rights, Titles, Remainders, Reversions, Limitations, Trusts, and Interests whatsoever, of and in the Lands comprised in such Conveyances which shall have been purchased or compensated for by the Consideration therein mentioned ; but although Terms of Years be thereby merged, they shall in Equity afford the same Protection as if they had been kept on foot, and assigned to a Trustee for the Promoters of the Undertaking to attend the Reversion and Inheritance.

Where a jury have assessed compensation and the inquisition has been made a record, that of itself is a sufficient title to vest the property in the promoters without any other conveyance.

Illustration.

A company had power to take land, and it was directed that, in case of differences arising with the landowners, a compensation jury should be impanelled and that the verdict should be made a record of quarter sessions :—*Held*, that if the company took possession after payment of the sum assessed, no conveyance was necessary, the record of quarter sessions being available as a title : *Bruce v. Willis* (1840), 3 P. & D. 220 ; 52 R. R. 408. “The section then goes on to enact that, if the landowners refuse to agree with the undertakers, the Commissioners may impanel a jury, who are to assess ‘such damages and recompense as they think fit,’ and ‘the value and recompense so to be assessed and decreed’ shall be binding, and the orders, sentences or decrees so made shall be set down in writing and be kept upon record amongst the records of the sessions. . . . It is very true that in this case there has been no conveyance of the land on which the cut and locks have been made ; but that appears to me to be unnecessary, because, where a jury have assessed compensation and the inquisition is made a record, that of itself is a sufficient title” : *per* Littledale, J., at p. 229, *ib*.

NOTE (1).—The foregoing case does not affect the form of conveyance.

NOTE (2).—The forms of conveyance in the schedules are no longer in general use.

Costs of
Conveyances.

82. The Costs of all such Conveyances shall be borne by the Promoters of the Undertaking, and such Costs shall include all Charges and Expenses incurred, on the Part as well of the Seller as of the Purchaser, of all Conveyances and Assurances of any such Lands, and of any outstanding Terms or Interests therein, and of deducing, evidencing, and verifying the Title to such Lands, Terms, or Interests, and of making out and furnishing such Abstracts and attested Copies as the Promoters of the Undertaking may require, and all other reasonable Expenses incident to the Investigation, Deduction, and Verification of such Title.

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I. Effect of the section.

The section does not include the costs of preliminary negotiations or of determining what shall be conveyed or what shall be put in the conveyance.

Illustrations.

(1) Where a conveyance has been prepared, the owner of the land to be conveyed ought to have the costs of it, although it has become unnecessary through the execution of a deed poll by the purchasing company : *In re Divers, In re Crystal Palace Ry.* (1855), 1 Jur. (N.S.) 995.

(2) Where there was a bargain between the ground landlord of houses let at a gross ground-rent and a railway company, by which some of the houses had been taken for the payment of compensation at so many years' purchase on the rents of the houses taken, the costs of apportioning the ground-rents between the houses taken and those left are not payable under sect. 82 : *Ex parte Buck, In re Hampstead Junction Ry.* (1863), 1 H. & M. 519. "I do not see in what way I can give any costs under sect. 82 which are not costs of and incidental to the conveyance. But the conveyance is a perfectly distinct thing from that which is to be conveyed and from preliminary negotiations. The conveyance begins when you have ascertained what is to be conveyed, and then the provision of the Act is that the company are to pay the costs of verifying the title and the expense of conveyance. . . . As regards the Act, I think Mr. Speed's explanation the right one. Sect. 82 deals simply with the legal expenses of making title and conveying the property, taking these expenses in their largest sense, but not with any costs of ascertaining what that is which is to be put into the document" : *per Wood, V.-C.*, at p. 523, *ib.*

II. What costs are within the section.

(a) If it is necessary that letters of administration should be taken out in order to convey, the promoters must pay the costs of these.

Illustrations.

(1) Leaseholds belonging to a testator whose executor had died intestate were taken by a corporation, who required that letters of administration *de bonis non* should be taken out. This was done and an assignment taken from the administrator :—*Held*, that the corporation must pay the costs of taking out administration : *In re Liverpool Improvement Act* (1868), L. R. 5 Eq. 282 ; overruling *In re South Wales Ry.* (1851), 14 Beav. 418.

(2) In 1881 a railway company took land under an Act incorporating the Lands Clauses Act. The land had been demised by A. in 1828 for the life of M. or sixty-one years to H. and his assigns. H. assigned his interest to B., who died intestate leaving a widow, E., who assigned to K. The company required the personal representative of B. to join in the conveyance. C. took out letters of administration to B., and conveyed to K. for a nominal consideration :—*Held*, that the company was liable to pay the costs of this conveyance : *In re Dublin South City Market Co., Ex parte Keatley* (1890), 25 L. R. Ir. 265.

(3) On a petition by children claiming under a marriage settlement for payment out of purchase-money of leaseholds taken by a company, the Court required letters of administration to be taken out to the estates of other children deceased whose estates had vested :—*Held*, that the company must pay the costs of taking out the administrations : *In re Dublin Junction Rys., Ex parte Kelly* (1893), 31 L. R. Ir. 137.

(4) A local authority took part of lands to which K. was entitled in fee subject to a life annuity charged thereon, and 385*l.* was awarded as compensation. After the award K. died in Australia, having by his will given all his realty and personalty to a trustee in trust to sell and hold the proceeds for an Australian charity. Administration of K.'s estate with the will annexed was granted in Australia. After K.'s death the 385*l.* was lodged in court. Administration of the estate of K. with the will annexed was granted to A. in Ireland, who had been appointed by the Australian administrator his attorney for the purpose of taking out administration in Ireland and to collect the assets of K. Estate duty was paid by A. on the unsold real estate of K., the fund in court as representing the premises compulsorily purchased and some book debts due to the deceased. On the application of A. it was ordered that the money in court should be paid out to him and that the local authority should pay all costs properly and necessarily payable :—*Held*, that the costs of the power of attorney from the Australian administrator, the costs of the grant of administration in Ireland, and the portion of the estate duty applicable to the purchase-money of the lands compulsorily taken were properly payable by the local authority : *Ex parte Lurgan Urban Council, In re Kearns*, [1902] 1 I. R. 157.

(5) Land was taken by the War Office and the tenants' interests were acquired. The tenants had no title except occupation, and in some cases representation was required to be taken out to former occupiers :—*Held*, that the War Office was liable to pay the death duties as well as the costs of taking out letters of administration : *In re Bear Island Defence Works and Doyle*, [1903] 1 I. R. 164.

(b) The promoters are liable to pay the costs of an application by the vendor for the appointment of a person to convey, when such a course is necessary.

Illustrations.

(1) Land having been taken by a railway company from the transferee of a deceased mortgagee whose heir at law could not be discovered :—*Held*, that the company were bound to pay the costs of a petition by the vendor for the appointment of a person to convey to the company instead of the heir at law of the deceased mortgagee : *In re Nash's Estate* (1855), 4 W. R. 111.

(2) Where the heir at law of a mortgagee was not known, so that it became necessary for the vendor (the transferee of the mortgage) to apply to the Court to appoint a person to convey to the company :—*Held*, that under sects. 82 and 83 the company are liable to pay the costs rendered necessary by such application to appoint a person to convey, and that the order must be drawn up under sect. 82, and not under sect. 80, the money, by arrangement, having been paid into the L. & W. Bank, not the Bank of England : *In re Eastern Counties and Tilbury Junction Ry., Ex parte Cave* (1856), 26 L. T. (O.S.) 176.

(c) The “costs of conveyance” include the cost of registering title where this is compulsory and is required by the promoters.

Illustration.

A railway company took, under statutory powers, part of certain land bought by G. under the Land Purchase Acts, subject to an annuity payable to the Land Commission. G. had not registered his title, pursuant to the Local Registration of Title Act, 1891, and the company required this to be done, and it was done accordingly :—*Held*, that the company was liable to pay the costs of the registration as “costs of conveyance” under sect. 82 : *In re Belfast and Northern Counties Ry., Ex parte Gilmore*, [1895] 1 I. R. 297.

(d) Costs incurred before the conveyancing counsel are provided for by sects. 82 and 83, and being liable to taxation, a proper bill of them should be delivered to the company.

Illustration.

A reference to chambers was ordered to ascertain who were the heirs of T. S., whose land had been taken. Advertisements were ordered; several claimants appeared, and the investigation proved troublesome. The question was then raised who was to pay the costs incurred before the conveyancing counsel :—*Held*, that these were payable by the company, who had a right to have a proper bill delivered to them so that the same could be taxed : *In re Spooner* (1855), 1 K. & J. 220.

(e) Costs of getting in legal estate. In cases before the Lands Clauses Act it was held that the costs of an action against an infant heir or devisee, brought for the purpose of obtaining a conveyance of the legal estate after notice to treat had been given, but before completion of the conveyance, were not payable by the promoters, where such costs had been materially increased, or the difficulties in the matter had been created or increased, by some act of the owner (the vendor).

Illustrations.

(1) The plaintiffs contracted with the father of the defendant for the purchase of a piece of land, but the vendor dying before the conveyance was executed the legal estate in the

premises descended to the defendant, who was the heir-at-law and an infant. The plaintiffs thereupon filed their bill for specific performance of the contract, for the purpose of obtaining a conveyance from the infant heir :—*Held* that, as there would have been no occasion for a suit if the owner had taken the precaution of devising the estate to his executor or to a person in trust to convey to the purchasers, the costs of the suit must come out of the purchase-money : *Midland Counties Ry. v. Westcomb* (1840), 9 L. J. Ch. 324.

(2) Same point, *Midland Counties Ry. v. Culdecott* (1840), 3 Rail. Cas. 394.

(3) A landowner, having contracted in writing for the sale of a piece of land to a railway company, died having devised all his real estate in strict settlement :—*Held*, that the costs of the suit, begun for the purpose of providing a conveyance to the company under 1 Will. IV. c. 60, must be defrayed out of the purchase-money : *Eastern Counties Ry. v. Tufnell* (1843), 3 Rail. Cas. 133.

NOTE.—The procedure for obtaining a conveyance where the person with whom the contract was made has died before conveying the land to the promoters is now simplified by sect. 4 of the Conveyancing and Law of Property Act, 1881, which provides as follows :—

“(1) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.

“(2) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

“(3) This section applies only in cases of death after the commencement of this Act.”

(f) Costs which cannot be recovered as against the promoters. In the particular circumstances of the following case the promoters were held *not* liable to pay costs incurred by a vendor in completing his title.

Illustration.

In July, 1858, P. and his brother were seised in fee simple as tenants in common of land, part of which was subject to a mortgage. Notice to treat for a portion of the land was served upon the owners, one small part of which was included in the mortgage. The sum of 25,000*l.* was asked for the land required. In April, 1859, the brother died intestate, and P., as his heir at law, became seised of the whole of the property, and ultimately an agreement was come to for the sale of the land required for 12,800*l.* Nothing was said as to the mortgage. The mortgaged part of the land was vested in the trustees of the will of the original mortgagee, whose estate was in course of administration in Chancery. The purchasing company required the concurrence of these trustees; and P. thereupon applied to the Court for the leave of the Court to the trustees releasing the mortgaged part of the land included in the contract of sale, and this was ordered by the Court. On taxing P.'s costs the taxing master disallowed the costs of the above application to the Court, but Wood, V.-C., directed the master to review his taxation :—*Held* that the company, under the contract, not being competent to deal with the mortgagee, were not liable to pay

these costs : *Ex parte Phillips, In re London and South-Western Ry.* (1862), 32 L. J. Ch. 102.

(g) Costs of a document carrying into effect a subsidiary agreement are not charges incurred in the conveyance.

Illustration.

Where a railway company purchased land from a colliery company, and part of the agreement was that the railway should carry the vendor's coals at a fixed price :—*Held*, that the costs of the instrument carrying into effect such agreement were not charges incurred in the conveyance of the land to the company and were not payable under sect. 82 : *In re Letch and Kewney* (1867), 15 W. R. 1055.

(h) The following cases illustrate the interpretation placed by the Court upon special provisions in various Acts as to the costs of making out a title, completing the purchase, &c.

Illustrations.

(1) The guardians of the G. Union agreed with A. for the purchase of land required by them as such. The master reported in favour of the title, and a petition was then presented for a confirmation of the report and for the costs :—*Held*, that the Court had power, under 5 & 6 Will. IV. c. 69, s. 2 (which empowered the Court "to order the expenses attending such purchase, payment or application, or any part thereof, to be paid by such guardians or overseers"), to direct the guardians or overseers to pay all necessary costs incurred in completing the purchase : *Ex parte Albemarle (Earl), In re Guiltcross Union* (1838), 7 L. J. Ex. Eq. 63.

(2) Land was purchased by a railway company under a special Act (3 Will. IV. c. xlvi.) which provided (*inter alia*) that "all such contracts, sales and conveyances" made under the Act should be so made at the expense of the company. By a later Act the company were empowered to take additional land, and it was enacted that the company should pay the reasonable expenses incurred by the vendor in valuing the land, establishing and making out his title, and all the expenses of the conveyances on the part of the vendor as well as of the purchasers :—*Held*, that the vendors were entitled to their costs of making out the title, the effect of the more specific words in the later Act not being to restrict the application of the more general words in the earlier Act : *Ex parte Addey's Charity, In re London and Greenwich Ry.* (1843), 12 L. J. Ch. 513.

(3) Upon the construction of sect. 49 of 3 & 4 Vict. c. 87, by which it was provided that it should be "lawful for the said Court to order the expenses of all purchasers from time to time to be made in pursuance of this Act, or so much of such expenses as the said Court shall deem reasonable, to be paid by the said Commissioners [of Woods and Forests], who shall from time to time pay such sum or sums of money out of the monies applicable to the purposes of this Act as the said Court shall direct" :—*Held*, that the costs incurred by a tenant for life in making out the title to property taken by the Commissioners did not fall within the description of "expenses of purchases," and therefore were not payable by the Commissioners : *In re Strachan's Estate* (1851), 9 Hare, 185.

(i) Liability of promoters to pay death duties.

Illustration.

In re Bear Island Defence Works and Doyle, [1903] I. R. 164, *ante*, p. 550 ; and *Ex parte Lurgan Urban Council, ib.*

III. Solicitors' Remuneration Act, 1881.

(a) Vendor's costs.

Illustration.

W. sold land as absolute owner to a local body by agreement, which provided that the purchaser should pay all W.'s costs as between solicitor and client. The public body purchased under the powers of the Public Health Act, 1875, which incorporates the Lands Clauses Act :—*Held*, that rule 11 of Sched. I. Pt. I. of the General Order under the Solicitors' Remuneration Act applied, and that the scale charges of Sched. I. did not apply : *In re Burdakin*, [1895] 2 Ch. 136.

(b) Purchaser's solicitor's costs. The exception in rule 11 of Sched. I. Pt. I. of the General Order under the Act does not apply to the purchaser's solicitor.

Illustrations.

(1) "Two other questions remain. One is whether the scale applies at all to work done for a purchaser in case of a purchase under the Lands Clauses Consolidation Act. The doubt arises under the 11th of the rules in Sched. I. Pt. I. of the General Order, which contains this provision : 'In case of sales under the Lands Clauses Consolidation Act, or any other private or public Act under which the vendor's charges are paid by the purchaser, the scale shall not apply.' . . . Sched. I. provides one scale for the vendor's solicitor and another and different one for the purchaser's solicitor. The early part of rule 11 refers to negotiating in case of a 'sale or purchase,' but the words which I have quoted from that rule, which are at the end of it, refer only to the case of 'sales' under the Lands Clauses Act. Looking to the 82nd section of that Act, I have no doubt that the reference to sales only is intentional, and I think the reason is apparent. That section provides in effect that, where lands are taken compulsorily, the vendor's costs shall be borne by the purchasing company, and gives a liberal allowance of such costs which it is the obvious purpose of this rule 11 not to interfere with. But no such reason exists for excepting the purchaser's costs, in the case of lands compulsorily taken, from the operation of this Order for a scale charge, and consequently the latter part of rule 11 seems to be limited, designedly and with reason, to the vendor's costs in case of a sale under compulsory powers" : *per* Kay, J., in *In re Stewart* (1889), 41 Ch. D. 494 at p. 505.

(2) A grant of a new easement is not a "conveyance of property" within the meaning of Sched. I. Pt. I. of the General Order under the Solicitors' Remuneration Act, 1881 ; and therefore a solicitor's costs in relation to such a grant are not governed by the scale fee in that part of the Order : *In re Sanders' Settlement*, [1896] 1 Ch. 480.

83. If the Promoters of the Undertaking and the Party entitled to any such Costs shall not agree as to the Amount thereof, such Costs shall be taxed by One of the Taxing Masters of the Court of Chancery [*or by a Master in Chancery in Ireland,*] upon an Order of the same Court, to be obtained upon Petition in a summary Way by either of the Parties ; and the Promoters of the Undertaking shall pay what the said Master shall certify to be due in respect of such Costs to the Party entitled thereto, or in default

thereof the same may be recovered in the same Way as any other Costs payable under an Order of the said Court, or the same may be recovered by Distress in the Manner hereinbefore provided in other cases of Costs ; and the Expense of taxing such Costs shall be borne by the Promoters of the Undertaking, unless upon such Taxation One Sixth Part of the Amount of such Costs shall be disallowed, in which Case the Costs of such Taxation shall be borne by the Party whose Costs shall be so taxed, and the Amount thereof shall be ascertained by the said Master, and deducted by him accordingly in his Certificate of such Taxation.

The words in italics were repealed by the Statute Law Revision Act, 1892.

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I. When the costs are to be taxed.

An order for taxation cannot be obtained under the section after the costs have been paid.

Illustration.

"It is contended, on the one part, that that clause [*i.e.*, sect. 83] only applies to taxation before payment, and for two reasons. In the first place, that the clause itself goes on to provide for the payment by the promoters of the amount of the taxed costs, a direction which, it is apparent, can apply only in the case of the taxation of an unpaid bill of costs. In the second place, it is said that if the construction is to be put upon the clause which is urged by the respondents, the power of taxation, notwithstanding payment, is an unlimited one, and that such an order can be obtained after any lapse of time, without showing any overcharge or any special circumstances, as a matter of right on a summary petition, and therefore as an order of course. Such a course, it is suggested, is unreasonable. These two arguments have, in my mind, very great weight, and it appears to me that I should be doing wrong if I were to hold that under the section which provides first for taxation and then for payment, it is open for the railway company at any time after payment to obtain a taxation as of course. Whether they have any remedy by any other step than the order of course is not for me now to determine": *per* Fry, J., in *Ex parte Somerville, In re South-Eastern Ry.* (1883), 23 Ch. D. at p. 168.

II. Cases where costs cannot be taxed.

Illustration.

Where, upon taking lands, an inquisition for the determination of the compensation due was begun but afterwards abandoned, and possession was allowed upon the company's giving an undertaking in writing to pay any sum to which the vendor's solicitor was

found to be entitled, it was *held* that such costs could not be taxed under sect. 83 : *Drogheda (Marquis) v. Great Southern and Western Ry.* (1847), 12 Ir. Eq. R. 103.

III. Review of taxation.

The Court has jurisdiction to review the master's taxation of costs under this section, because the taxation proceeds upon an order obtained by petition to the Court of Chancery. But in 32 & 33 Vict. c. 18, s. 1, and 58 & 59 Vict. c. 11, though the persons to tax are designated as masters of the Superior Courts of law or of the Supreme Court, they do not act in the taxation as masters.

Illustrations.

(1) Where costs have been taxed under sect. 83 of the Act, the Court has jurisdiction to review the master's taxation, but this is not so where the costs have been taxed and settled after an inquiry before the sheriff under sect. 52 of the Lands Clauses Act or after an inquiry before arbitrators under 32 & 33 Vict. c. 18, s. 1 (repealed by 58 & 59 Vict. c. 11) : *Owen v. London and North-Western Ry.* (1867), L. R. 3 Q. B. 54.

(2) "An arbitration under this Act is not a proceeding in any court ; in this respect it resembles a proceeding to assess compensation by a jury, and though by 32 & 33 Vict. c. 18, s. 1, the persons are designated who are to tax the costs in a proceeding in arbitration, they do not act in the taxation as masters. . . . The case is not like the cases where costs are taxed by one of the taxing masters in the Court of Chancery, under sect. 83 of the Lands Clauses Consolidation Act, 1845, and where it is said that the taxation may be reviewed : in those cases the taxation proceeds upon an order obtained upon a petition, and therefore the Court of Chancery would have jurisdiction to review the master's decision " : *per* Brett, L.J., in *In re Sandbach Charity Trustees and North Staffordshire Ry.* (1877), 3 Q. B. D. at p. 5 ; *Owen v. London and North-Western Ry.* (*ante*), followed.

NOTE.—By sect. 1 of 32 & 33 Vict. c. 18, now repealed, it was provided that the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the Superior Courts of law. This is re-enacted in 58 & 59 Vict. c. 11, but extended to costs of an inquiry before a jury.

Entry on Lands.

And with respect to the Entry upon Lands by the Promoters of the Undertaking, be it enacted as follows :

Payment of Price to be made previous to Entry, except to survey, &c. **84.** The Promoters of the Undertaking shall not, except by Consent of the Owners and Occupiers, enter upon any Lands which shall be required to be purchased or permanently used for the Purposes and under the Powers of this or the Special Act, until they shall either have paid to every Party having any Interest in such Lands, or deposited in the Bank, in the Manner herein mentioned, the Purchase Money or Compensation agreed or

awarded to be paid to such Parties respectively for their respective Interests therein: Provided always, that for the Purpose merely of surveying and taking Levels of such Lands, and of probing or boring to ascertain the Nature of the Soil and of setting out the Line of the Works, it shall be lawful for the Promoters of the Undertaking, after giving not less than Three nor more than Fourteen Days Notice to the Owners or Occupiers thereof, to enter upon such Lands without previous Consent, making Compensation for any Damage thereby occasioned to the Owners or Occupiers thereof.

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I. Consent of owners and occupiers to entry upon land.

(a) If the promoters enter on land without obtaining the consent of the owners and occupiers, or do not otherwise comply with the requirements of the section, they are liable in trespass.

Illustration.

In an action for breaking a close and cutting a tunnel through it, a company justified under the Act by which they were incorporated and empowered to make a railway, averring that the close was a highway and delineated on their plans and in their books of reference as part of the lands through which the railway was to pass; to which the plaintiff replied that the close was required to be purchased and permanently used for the railway, and that, he being entitled to the soil thereof, subject to a public right of way over the same, the company entered and made the tunnel without his consent, and without giving him notice to sell and convey the same and take it for the purpose of permanently using it for the purpose of the railway:—*Held*, that the company was not justified in having entered on the land without first paying compensation to the owner of it: *Ramsden v. Manchester, South Junction and Altrincham Ry.* (1848), 1 Ex. 723.

(b) If the circumstances are such as to lead the promoters *bonâ fide* to suppose that they have the consent of the owners and occupiers, or if an entry is necessary for the public safety, the Court may refuse to grant an

injunction restraining the prosecution of the works on the land, but will in general order payment into court of the probable value of the land.

Illustrations.

(1) A railway company entered on the land of A. without notice or permission. As it appeared, however, that there had been a disposition on the part of A. to treat with the company, and it being proved that the steps taken by the company were necessary for the public safety, an injunction was refused, the company undertaking to pay into court the probable value of the land taken: *Tower v. Eastern Counties Ry.* (1843), 3 Rail. Cas. 374.

(2) Where it was doubtful whether the consent given by the landowner was qualified or was general, the Court refused to stop the railway company's works, as perfect justice could be done by compelling the company to pay for the land. The approximate value of the land was ordered to be deposited until the amount should be determined: *Langford v. Brighton, Lewes and Hastings Ry.* (1845), 4 Rail. Cas. 69.

(3) A railway company took possession of the centre area of a public square for the purposes of their undertaking, without having first given the proper notices under the Lands Clauses Act, contending that the parties, who were public commissioners for the paving (*inter alia*) of the square, were not owners and had no such interest as made it obligatory to serve notices on them:—*Held*, upon an application for an injunction to restrain the company from proceeding with the works in the square, that, the company undertaking to deposit the estimated value the commissioners put upon their interest in the land and to pay such further sum, if any, at which the value of the interest in the square might be assessed, the injunction should not be granted: *Murray v. London and Blackwall Ry.* (1851), 18 L. T. (O.S.) 235.

(c) Where the owner has given his consent to the entry on the land he cannot afterwards, on a disagreement taking place between the parties as to terms, revoke such consent and treat the promoters as trespassers.

Illustrations.

(1) A railway company required certain lands of H. for the purposes of their Act, and it was agreed between them and him that the compensation and purchase-money should be settled by arbitration. H. permitted the company to enter upon the land and commence their works there pending a reference. An award was made, but the parties then disagreed as to the conveyance by which it was to be carried into effect, and H. brought ejectment:—*Held*, that he could not now treat the company as trespassers, but must seek his remedy under the award: *Doe dem. Hudson v. Leeds and Bradford Ry.* (1851), 16 Q. B. 796.

(2) To a count for trespass to a house the defendants pleaded that the house was delineated in the plans and described in the books of reference deposited as required by their Act, and that it was necessary to take and use the house for the purpose of their Act, and that they entered and took possession with the consent of the owner and occupier, and after such entry and possession taken the plaintiff took possession of the house and occupied the same; and the defendants, because it was necessary to the construction of their works, entered the house, the plaintiff then being therein, and pulled down same:—*Held*, that the plea was good, and that, as decided in *Doe dem. Hudson v. Leeds and Bradford Ry.* (*supra*), the consent could not be revoked: *Knapp v. London, Chatham and Dover Ry.* (1863), 32 L. J. Ex. 236.

II. Meaning of "enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special Act."

(a) Mere interference with the enjoyment of an easement over the land taken does not amount to an entry upon the land, and the owner's right is not to an injunction, but to compensation under sect. 68 (*ante*) as for land injuriously affected. The provisions, therefore, of sects. 84 and 85 do not apply to such a case.

Illustrations.

(1) An Act of Parliament gave certain commissioners power to purchase lands, &c., and directed them to make compensation to persons interested therein for all damage sustained:—*Held*, that a person entitled to an easement over lands so purchased by them could not maintain trespass for acts done upon those lands to the prejudice of his easement; but as soon as any damage was actually sustained, he ought to have claimed compensation under the Act: *Thicknesse v. Lancaster Canal Co.* (1838), 4 M. & W. 472; 51 R. R. 692.

(2) A railway company had obtained a further Act enabling them to widen and improve part of the railway, including the part carried over the plaintiff's reservoir. The plaintiff thereupon filed his bill, alleging that the effect of the alteration would be to cause a further accumulation of mud and a great loss of water, and to impede the flow of the tide into the mill-dam, thereby occasioning inconvenience to the plaintiff in the use and occupation of the mill. The bill alleged that the company had never paid or compensated the plaintiff for the loss of any land or water other than that caused by the erection of the first bridge. The bill prayed that the company might be restrained from widening or enlarging the bridge, or the piers or abutments, or from interfering with the flow of the tide into the mill-dam, or with the plaintiff's right of way and access along the banks of the dam and reservoir, until the purchase-money or compensation had been ascertained and paid. Injunction refused: *Hutton v. London and South-Western Ry.* (1849), 7 Hare, 259.

NOTE.—This case was approved by Romilly, M.R., in *Ferrand v. Bradford Corporation* (1856), 21 Beav. 412, *post*.

(3) The Waterworks Clauses Act, 1847, requires full compensation to be made for all lands *or streams* taken or injuriously affected, and "expressly makes the same distinction with respect to the streams, which the Lands Clauses Act does with respect to lands—that is to say, if you take the stream, you must pay the whole price of it; if you injuriously affect it, then that clause does not apply. But when you have injuriously affected the stream, compensation in damages must be made, in accordance with the ordinary mode": *per Romilly, M.R.*, in *Ferrand v. Bradford Corporation* (1856), 21 Beav. at p. 419.

NOTE.—This case was followed in *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99, *infra*.

(4) M., the owner of a wharf on the Thames, had a right of free access from the river, and also the right of loading and unloading barges at his wharf. There was no camp-shed or hard, but at low water the barges rested on the mud of the foreshore. The M. Board of Works was proceeding, under statute, to fill up the river in front of M.'s wharf. Thereupon M. filed a bill to restrain them from so doing without first making a deposit and entering into a bond under sect. 84 of the Lands Clauses Act:—*Held*, that the Board of Works was not taking and using for the purposes of the undertaking any easement or interest

in lands belonging to M., but was only injuriously affecting his rights, and, therefore, could not be restrained from proceeding with their works: *Macey v. Metropolitan Board of Works* (1864), 33 L. J. Ch. 377; approved in *Clark v. London School Board*, *post*.

(5) T. was licensee of a pier under the Thames Conservancy. Under a special Act incorporating the Lands Clauses Act, the M. Board of Works proposed to alter and divert the pier, making temporary accommodation for the traffic, and on completion of the work to substitute a new pier for that then existing:—*Held* that, on the construction of the special Act, the Board were not about permanently to use and take the pier, nor were they about to procure the extinguishment of T.'s easement, and that therefore the assessment and payment of compensation was not necessary before the Board could proceed with their works: *Temple Pier Co. v. Metropolitan Board of Works* (1865), 13 W. R. 535.

(6) "The interference with ancient lights is not a thing which is capable of being entered upon." The word 'entering' is inapplicable to it, and therefore such a section as the 85th [of the Lands Clauses Act] is inapplicable in this case": *per* Lord Selborne, C., in *Clark v. London School Board* (1874), L. R. 9 Ch. at p. 124. "There is merely a difference in the forms that are to be adopted for the purpose of getting compensation, and by the terms of the Lands Clauses Act this is to be treated as land which has been injuriously affected: *per* Mellish, L.J., at p. 126, *ib*."

(7) A company were empowered by their Act, which incorporated the Lands Clauses Act, to take certain land and erect a building thereon. B. alleged that the building would interfere with his ancient lights, and sought to restrain the company by injunction:—*Held*, that the company could not be so restrained, but that B.'s only remedy was under sect. 68: *Bedford (Duke) v. Dawson* (1875), L. R. 20 Eq. 353.

(8) By an Act which incorporated the Lands Clauses Act a waterworks company was empowered to divert the water of the B. springs. E. was tenant for life of certain water meadows through which the B. brook flowed and which were irrigated by water from the B. brook. The company took water at a spot above these water meadows, and E. sought to restrain them from so doing, alleging a serious diminution in the flow of water:—*Held*, that E.'s only remedy was to compensation: *Bush v. Trowbridge Waterworks* (1875), L. R. 10 Ch. 459; distinguished in *Stone v. Yeovil Corporation* (*infra*), on the ground that only a portion of the water was abstracted, whereas in *Stone v. Yeovil Corporation* and *Ferrand v. Bradford Corporation* the whole stream was diverted.

(9) The defendants had power under their Act to purchase and divert the whole of a stream, and they gave notice to the plaintiff of their intention to do so:—*Held*, that they were bound to make compensation at once for the whole value of the interests in the stream of the mill-owners, and not merely to compensate them from time to time for injuriously affecting the property: *Stone v. Yeovil Corporation* (1876), 2 C. P. D. 99.

(10) The M. Railway Co., under statutory powers, took land in which were laid certain pipes belonging to the plaintiffs. These pipes were not removed by either the M. Company or the plaintiffs at the time when the former took the land, but the ground in which they lay was overlaid with additional earth. Afterwards the M. Company, when tunnelling through the ground, came upon the pipes and removed them, but did not hand them over to the plaintiffs or pay their value. The plaintiffs thereupon sought compensation as for injurious affection of their alleged interest:—*Held*, that the facts stated gave the plaintiffs no interest in the land, and therefore they could not have any compensation under the Lands Clauses Act: *New River v. Midland Ry.* (1877), 25 W. R. 502.

(11) The plaintiffs were the owners of four houses on the west side of C. Street, Birmingham. There were ancient windows in the houses in respect of which the plaintiffs

had become entitled to rights of light over certain lands on the east side of C. street. The local authority, for the purpose of carrying out a scheme under the Artizans and Labourers' Dwellings Improvement Act, 1875, had acquired the land on the east side of C. street and cleared it. The defendants took a lease of this land and erected thereon buildings which were in conformity with the designs approved by the local authority, but they interfered with the plaintiffs' right to light in a manner which would, under ordinary circumstances, have entitled them to damages or an injunction:—*Held*, that sect. 20 of the Artizans' Dwellings Act, 1875, extinguished all easements affecting the property taken, and that the plaintiffs' right was one to compensation: *Badham v. Maris* (1882), 52 L. J. Ch. 237, *n*.

(12) In a case under the Artizans' Dwellings Act, 1875, where the plaintiffs claimed to be entitled to a right to support to a building from another building which had been acquired by a local authority, it was *held* that the only right the plaintiffs could have was to compensation: *Swainston v. Finn and the Metropolitan Board of Works* (1883), 52 L. J. Ch. 235.

(13) By an Act which incorporated the Lands Clauses Act the M. Board of Works were empowered to acquire certain lands for the G. Street improvement and to purchase easements over such lands:—*Held*, that an adjacent owner had no right to an injunction to restrain a tenant of the Board from obstructing ancient lights by building artisans' dwellings on one of the plots rightly devoted to that purpose, but that his right was to compensation under sect. 68 of the Lands Clauses Act: *Wigram v. Fryer* (1887), 36 Ch. D. 87. "Interference by the Board with the access of light over the premises they are taking or using, to the neighbouring premises, is a matter with respect to which the person injured may obtain compensation under the 68th section of the Lands Clauses Act, that is to say, by applying for compensation for the injury done at any time, even after the works are completed, and not by way of injunction to restrain the work being done": *per* North, J., at p. 96, *ib*.

(14) In 1894 the L. School Board, under statutory powers, acquired a site for a school and erected a hoarding enclosing the site with a view to building. The site so enclosed included part of a private road over which the defendant, who was the owner of adjacent premises, claimed a right of way. The defendant, not having been paid any compensation for interference with his alleged right of way, repeatedly pulled down that part of the hoarding which obstructed the private road:—*Held*, that the School Board was entitled to an injunction restraining the defendant from pulling down or interfering with the hoarding: *London School Board v. Smith* [1895] W. N. 37. "All the cases on the point ran on the same lines. The difficulty lay in this, that this right of way was, in principle, the same as 'land,' and could only be acquired as land, but it was land which was not to be acquired by the same form of procedure as the soil": *per* Kekewich, J., *ib*.

(b) The placing of waggons and tools upon land does not amount to an entering upon land.

Illustration.

A corporation, under statutory powers, gave notice to the owner of land of an intention to take it. They then entered regularly upon the land for the purpose of surveys, &c., and afterwards their contractors, without the knowledge of the corporation, but with the assent of the occupying tenants, brought some waggons and rails and other implements on the land and there left them, but did not begin the works or do any damage. This was done without the assent of the plaintiff, but it became known to his agent at the end of December, 1851. At the beginning of the following February, without any previous communication with the defendants, the plaintiff filed his bill for an injunction to restrain them from allowing the waggons, &c., to remain on the land and from

taking possession of the land until they had complied with the provisions of the Lands Clauses Act :—*Held* that, although the corporation were bound by the acts of their contractors, the acts done were not a taking of possession within the meaning of the Act, and hence the motion failed : *Standish v. Liverpool Corporation* (1852), 1 Drew. 1.

(c) The drawing of a line on land for the purpose of a survey of same does not constitute an entering upon the land.

Illustration.

A railway company entered upon land and dug a line along it without the consent of and without having given any notice to the owner, who thereupon filed his bill for an injunction. The company having stated that they entered upon the land solely for the purpose of making a survey, and that they did not intend to proceed any further without giving the requisite notices, the Court refused to make any order on the motion but reserved the costs : *Fooks v. Wilts, Somerset and Weymouth Ry.* (1846), 4 Rail. Cas. 210.

(d) Where the special Act authorises the taking of an easement in such a manner as to be the equivalent of taking "land," sect. 84 applies (*see* sect. 18, *ante*, p. 125).

Promoters to be allowed to enter on Lands before Purchase, on making Deposit by way of Security and giving Bond.

85. Provided also, that if the Promoters of the Undertaking shall be desirous of entering upon and using any such Lands before an Agreement shall have been come to or an Award made, or Verdict given for the Purchase Money or Compensation to be paid by them in respect of such Lands, it shall be lawful for the Promoters of the Undertaking to deposit in the Bank by way of Security, as herein-after mentioned, either the Amount of Purchase Money or Compensation claimed by any Party interested in or entitled to sell and convey such Lands, and who shall not consent to such Entry, or such a Sum as shall, by a Surveyor appointed by Two Justices in the Manner herein-before provided in the Case of Parties who cannot be found, be determined to be the Value of such Lands, or of the Interest therein which such Party is entitled to or enabled to sell and convey, and also to give to such Party a Bond, under the Common Seal of the Promoters if they be a Corporation, or if they be not a Corporation under the Hands and Seals of the said Promoters, or any Two of them, with Two sufficient Sureties to be approved of by Two Justices in case the Parties differ, in a Penal Sum equal to

the Sum so to be deposited, conditioned for Payment to such Party, or for Deposit in the Bank for the Benefit of the Parties interested in such Lands, as the Case may require, under the Provisions herein contained, of all such Purchase Money or Compensation, as may in manner herein-before provided be determined to be payable by the Promoters of the Undertaking in respect of the Lands so entered upon, together with Interest thereon, at the Rate of Five Pounds per Centum per Annum, from the Time of entering on such Lands, until such Purchase Money or Compensation shall be paid to such Party, or deposited in the Bank for the Benefit of the Parties interested in such Lands, under the Provisions herein contained; and upon such Deposit by way of Security being made as aforesaid, and such Bond being delivered or tendered to such non-consenting Party as aforesaid, it shall be lawful for the Promoters of the Undertaking to enter upon and use such Lands, without having first paid or deposited the Purchase Money or Compensation in other Cases required to be paid or deposited by them before entering upon any Lands to be taken by them under the Provisions of this or the Special Act.

This section is amended as to railway companies by 30 & 31 Vict. c. 127, s. 36 : see *infra*.

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Sect. 36 of the Railway Companies Act, 1867, provides thus :—

"36. Where, after the passing of this Act, a company exercise the powers conferred on the promoters of the undertaking by section 85 of the Lands Clauses Consolidation Act, 1845, the following provisions shall have effect :—

- "(1) The surveyor to be appointed as in that section provided shall be appointed by the Board of Trade instead of by two justices, and all the provisions of that Act relative to a surveyor appointed by two justices shall apply to a surveyor so appointed by the Board of Trade ;
- "(2) The company shall give not less than seven days' notice of their intention to apply to the Board of Trade for the appointment of a surveyor to any party interested in or entitled to sell and convey the lands in question, and not consenting to the entry of the company ;
- "(3) The valuation to be made by the surveyor so appointed shall include the amount of compensation for all damage and injury to be sustained by reason of the exercise of the powers conferred by the said section as far as such damage and injury are capable of estimation ;

- “(4) The sureties to the bond to be given by the company under that section shall, in case the parties differ, instead of being approved of by two justices, be approved of by the Board of Trade, after hearing the parties.”

I. The object and scope of the section.

(a) The object of the section is to enable promoters to get immediate possession of lands required for the purposes of the undertaking. Before, however, they can do this, there must exist between the parties the relation of vendor and purchaser, arising either from an agreement to sell and purchase which leaves the price to be ascertained in the manner therein stipulated, or from a notice to treat which gives rise to an inchoate statutory contract of purchase and sale.

Illustrations.

(1) “The party having given notice of his intention to purchase a certain piece or portion of a piece of land, which portion is described, the description not being objected to and not being a matter of dispute between the parties, the Act raises no question whatever as to identity. Under the 85th section it is only provided by what means the company may take possession of the land identified by prior transactions”: *per* Lord Cottenham in *Willey v. South-Eastern Ry.* (1849), 1 Mac. & G. at pp. 67—68.

(2) A railway company gave A. notice to treat. A. thereupon sent to the company particulars of his interest in the land and of his claim to compensation, but after considerable negotiations the agreement (so far established) was repudiated by both parties and the claim abandoned. The company thereupon proceeded under sect. 85 of the Lands Clauses Act, and A. filed his bill seeking to compel the company to proceed under the earlier provisions of the Act, and to call upon them to issue their warrant for a jury. The bill stated that a claim was made and an agreement concluded:—*Held* that, in these circumstances, sect. 21 of the Lands Clauses Act did not apply, but that the rights of the parties were regulated by sect. 85 of the Act, which, together with sect. 68, gave A. an ample remedy: *Adams v. London and Blackwall Ry.* (1850), 2 Mac. & G. 118.

(3) “Then comes sect. 85, which gives the promoters power to ‘enter upon and use’ lands requiring to be purchased or permanently used, ‘before an agreement shall have been come to, or an award made, or verdict given for the purchase-money or compensation to be paid by them in respect of such lands.’ The determination of the present case depends, in my opinion, upon the meaning to be attached to these words ‘enter upon and use.’ . . . I venture to think that no right of entry is given by sect. 85 to promoters who neither have made an agreement to purchase land (leaving the price to be ascertained in manner therein stipulated), nor have created, by notice in terms of sect. 18, an inchoate statutory contract of purchase and sale. . . .”: *per* Lord Watson in *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. at p. 503.

(4) “In the first place, it is my opinion that sect. 85 does not provide for a notice to treat either in regard to purchase or purchase-money, but simply affords to promoters the means of obtaining possession of land to which they have acquired right, as purchasers, under an inchoate or imperfect contract already constituted by compulsory notice or by agreement. I have recently had occasion, in *Tiverton and North Devon Ry. v. Loosemore*, 9 App. Cas. 480, 500, to explain my reasons for holding that opinion, and I shall not repeat them here.

In that case Fry, J., held that the provisions of sect. 85 do not relate to compulsory taking within the meaning of sect. 23; but one of the grounds upon which the learned judge sustained the right of the company to proceed under sect. 85 was that 'they had given their notice to treat long before' (L. R. 22 Ch. D. 35, 39). Earl Cairns, in the same case, thus explains the scheme of the Lands Clauses Act, and the statutory consequences of a notice to take, duly given in terms of sect. 18:—'The statute appears to me to place the company and the respondent, by the notice to treat, in a position analogous to that of vendor and purchaser, with power to either side to have the price fixed and paid without delay, and with a further right in the company, within the period of five years, and without prejudice to the machinery for ascertaining the price, on giving adequate security for the highest value of the land, to take possession and make use of the land, whatever the legal consequence of that possession after the five years may be' (9 App. Cas. 488, 489): *per* Lord Watson in *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. at pp. 805, *et seq.* "If I am in error in my opinion that the compulsory powers referred to in sect. 16 are not applicable to the case before us, it would seem to me, nevertheless, that the notice of August 12th, 1882, was not a notice to treat within sect. 18, but constituted an election to accept the rights offered by sect. 8 of the special Act. That would seem at once to create such a relation between the companies of inchoate purchase and sale as to satisfy the difficulty entertained by my noble and learned friend opposite (Lord Watson), and enable him to coincide in opinion with my noble and learned friend beside me (Lord Bramwell) that the defendant company was in a position to take advantage of sect. 85 of the Lands Clauses Act, which stands outside the compulsory powers of the Act, and is unaltered by sect. 16": *per* Lord Fitzgerald at p. 196, *ib.*

(b) If before the time for the taking of land compulsorily has expired the relation of vendor and purchaser exists either by agreement or notice to treat, the powers under the section may be put into operation at any time before the time limited for the completion of the undertaking whether the undertaking could be completed within the time limited or not.

Illustrations.

(1) By an Act which incorporated the Lands Clauses Act, it was enacted that the power to take land compulsorily for the purposes of a certain railway should not be exercised after the expiration of three years from the passing of the Act. The company gave notice to a landowner of their intention to take a part of his land, but took no other step until three days before the expiration of their compulsory powers, when they delivered a bond, and proceeded to take possession under sect. 85 of the Lands Clauses Act. The landowner thereupon filed his bill for an injunction restraining the company from proceeding further with the purchase, on the ground that their compulsory powers had ceased. The Court granted an interim injunction, but directed a case for the opinion of the Court of Exchequer: *Kinnersly v. North Staffordshire Ry.* (1849), 6 Rail. Cas. 662.

(2) The compulsory powers of a railway company expired on August 4th, 1848. On June 26th, 1846, notice to treat had been given to an owner and afterwards delivered a bond to the plaintiff, to whom the lands had in the meantime been devised, and the estimated value of the lands was paid into the bank. The company obtained powers, under an amending Act, to take the lands mentioned in the notice, and on August 3rd, 1848, gave notice to the plaintiff that, in pursuance of such powers, they intended to take the lands. After August 4th, 1848, and without taking any further steps, the company went into possession of the lands. Upon motion for an injunction, the Court declined to interfere, on the ground that, although the company might not then be entitled to take possession under their compulsory powers, they were able, by taking steps under the amending Act to acquire the land: *Williams v. South Wales Ry.* (1849), 3 De G. & Sm. 354.

(3) A company gave a landowner notice to treat and entered on the land under sect. 85. The purchase-money was not assessed and no conveyance was executed. The three years' period having expired, it was *held* that the landowner might still have the purchase-money assessed, but that he could not re-enter upon the land: *Doe d. Armistead v. North Staffordshire Ry.* (1851), 16 Q. B. 526. "The compulsory clause, sect. 85, was acted upon within the three years and the land rightfully entered upon and taken. The company had exercised their compulsory power under it completely, so far as they were concerned, and, so far as they had need of any such power, the thing was done and finished on their part; for it is to be observed that the words of the 123rd section are in the disjunctive 'for the compulsory purchase or taking': the ascertaining the amount of compensation after the lands were entered upon and used, and indeed taken, is no exercise of a compulsory power on the part of the company": *per* Patteson, J., at p. 535, *ib.*

(4) A railway company gave a landowner notice to treat within the prescribed period. They then paid a deposit and gave a bond as required by sect. 85. It was *held* that entry by the company upon the land in respect of which the notice was given was not an exercise of their powers of compulsory purchase, but an act made legal by the previous exercise of their compulsory powers; and that such entry need not be made within the prescribed period, the notice to treat having placed the company and the landowner in the position of purchaser and vendor of the land: *Salisbury (Marquis) v. Great Northern Ry.* (1852), 17 Q. B. 840. "The question . . . is whether the company had the right to take the lands of the plaintiff comprised in the notice dated May 21st, 1851. To determine this we must look to the state of facts at that time. After the notice had been given by the company, all the steps prescribed by sect. 85 of the Lands Clauses Consolidation Act had been taken by them. That is not disputed. Then, what powers are given to them when these steps have been taken? Sect. 85 declares that it shall then 'be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them' under the provisions of that or the special Act. The company, however, had not entered before the expiration of the period prescribed for the exercise of their compulsory powers for the purchase of lands by sect. 27 of their special Act; and the question is, whether they had a right to enter afterwards. It was decided in *Doe d. Armistead v. North Staffordshire Ry.* (1851), 16 Q. B. 526, that where a company, having taken all the steps under sect. 85, had entered before the expiration of the prescribed period, an action of ejectment would not lie against them after such period had expired. We have, therefore, at present to consider what would be the effect of a company not entering within the prescribed period. This depends much upon whether the entry is an exercise of one of the powers of compulsory purchase. In my opinion, it is not. I think the power of entry is a power necessary for the completion of the purchase, but is not itself one of the powers of compulsory purchase. Those powers have been, I think, exercised within the five years": *per* Lord Campbell, C.J., at pp. 852—853, *ib.*

(5) A few days before the expiration of the three years within which a railway company's compulsory powers to purchase lands had to be exercised, the company served notice to treat on a landowner. No agreement was come to, nor was the compensation assessed. Thirteen days before the expiration of the five years prescribed for the completion of the railway, the company, having complied with the requirements of sect. 85 of the Lands Clauses Act, entered and proceeded to make the railway, the landowner objecting and resisting. The land was *bonâ fide* required for the railway:—*Held* that, whether the railway could or could not have been completed within the thirteen days, the entry under sect. 85 was lawful; that the company could not be restrained by injunction, but were entitled to remain and complete the railway after the expiration of the five years: *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. "It is settled law that the powers under the 85th section, even in the case of a compulsory purchase, are not compulsory powers, and are exercisable after the period for compulsory purchase has expired (*Salisbury v. Great Northern Ry.*, 17 Q. B. 840)": *per* Earl Cairns at p. 488, *ib.*

(6) After a railway company had given notice to treat for about six acres of the plaintiff's land and had served the plaintiff with notice under sect. 85 of the Lands Clauses Act of their intention to apply to the Board of Trade for the appointment of a surveyor to determine the value of the plaintiff's interest in the land, including compensation for injury, the plaintiff's surveyor suggested that certain alterations might be made which would make it unnecessary for the company to take more than about four acres of the plaintiff's land. A draft of proposals for an agreement was prepared, signed by the plaintiff's surveyor, which provided for the company's taking the four acres only, and their making a number of special accommodation works and paying a sum of 2,000*l.* as purchase-money. The company paid 2,000*l.* into court and executed a bond for 2,000*l.* in the statutory form under sect. 85. The company's contractors entered and began to do work on the land. The plaintiff thereupon sought an injunction restraining the company from taking or entering into possession and committing waste on the land, and also to restrain them from taking active steps to ascertain the value of the plaintiff's interest and from putting into force any of their compulsory powers until a valid notice to treat had been given. The plaintiff argued that he had made no claim to purchase-money such as to enable the company on payment of the amount claimed and delivery of a bond to enter under sect. 85, and further that the giving of notice to treat and entry under sect. 85 were the exercise of compulsory powers within the meaning of sect. 16, and therefore no effective notice to treat had been given and the company could not enter under s. 85 in default of the existence of a subscription contract (which there was not in this case):—*Held*, that the plaintiff's surveyor was not his agent to make a claim; that the document was not a claim, and if it was such, it did not relate to the land comprised in the notice to treat; and that the bond which referred to the land in the notice to treat was ineffective, and the company could not enter under sect. 85:—*Held also* that neither the giving of a notice to treat, nor taking steps to have the purchase-money and compensation ascertained, nor entry under sect. 85 is an exercise of compulsory powers under sect. 16: *Ford v. Plymouth, Devonport and South-Western Junction Ry.* [1887] W. N. 201. See *post*, p. 576.

(7) Under a special Act which incorporated the Lands Clauses Act a railway company were empowered to take lands compulsorily for the purpose of their undertaking, and the powers of the company for this purpose were to cease after the expiration of three years from the passing of the Act. The Act received the royal assent on August 9th, 1899, and on August 9th, 1902, the company gave to the plaintiffs a notice to treat. On an application for an injunction to restrain the company from proceeding under this notice:—*Held*, that the day of the passing of the Act must be excluded in the computation of the three years, and that the notice was served in time: *Goldsmiths' Co. v. West Metropolitan Ry.*, [1904] 1 K. B. 1.

(c) Although the promoters fulfil all the conditions required by sect. 85, yet if they do not actually take possession, the proceedings are not governed by sect. 68, but by sect. 38.

Illustration.

Land belonging to C. being required by a public body, notice to treat was given him, and negotiations were carried on. Afterwards, the promoters gave notice of entry under sect. 85 of the Lands Clauses Act, and complied with its conditions, but did not actually take possession. C. refused to refer the question of compensation to arbitration, and required the promoters to give notice within ten days for the summoning of a jury. An offer was made to C. of a certain sum, which was declined by C. The promoters then issued their warrant for summoning a jury, and gave C. notice under sect. 46 of the inquiry afterwards held, the result of which was that a sum smaller than that offered was awarded:—*Held*, that the lands had not been taken under sect. 85; that, as

the promoters, notwithstanding that they had made a deposit and given a bond, had not actually entered upon the lands, the proceedings were governed by sect. 38 and not by sect. 68; and that C. was entitled to have his costs taxed:—*Held also* that “taken” in sect. 68 means “actually taken”: *R. v. Manley Smith, In re Church and London School Board* (1892), 67 L. T. 197.

(d) Where the promoters have taken possession in accordance with sect. 85 it is for the owner of the land taken to proceed to have the price of same fixed and paid, and not the promoters.

Illustrations.

(1) On November 9th, 1847, a railway company sent notice to the plaintiffs that certain portions of their premises were required for the purposes of the railway; and on November 30th, the plaintiffs sent in particulars of their claim. After a fruitless negotiation between the parties the company, on June 30th, 1848, gave the plaintiffs formal notice of their intention to enter and take possession, and the plaintiffs not consenting to such entry, the company, under the 85th section of the Lands Clauses Consolidation Act, procured a valuation of the premises and paid the amount into the bank, and gave the bond as required by the Act and entered into possession on July 20th, 1848. The plaintiffs then abandoned their claim of November 30th, 1847, and required the company to take the necessary steps for summoning a jury to assess compensation. The company refusing to summon a jury, on April 2nd, 1849, the plaintiffs filed their bill, praying a declaration that the company were bound to complete the purchase according to the notice of November 9th, 1847, and that the company might be ordered to take all proper proceedings under the Act to settle the amount of compensation. A demurrer by the company for want of equity was allowed, on the ground that, the company having taken possession under the 85th section, the plaintiffs ought to have sent in particulars of their claim, which claim would have become an absolute right in case the company did not agree or did not proceed within twenty-one days to summon a jury: *Adams v. London and Blackwall Ry.* (1850), 19 L. J. Ch. 557.

(2) “In my opinion, where there has been a notice to treat, and where, before the price has been ascertained, the company has, under the statute, regularly obtained possession of the land, and proceeded to use it for making a railway, nothing more remaining to be done but the ascertainment of the price, the transaction is one that must go forward and not backward; the landowner has a continuing right under the statute to have the price fixed and paid, and that right he must pursue”: *per* Lord Cairns in *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. at p. 491.

II. Operation of the section.

(a) If the lands are in the hands of a receiver under the Court, the promoters, before entry under sect. 85, must first obtain the leave of the Court.

Illustration.

A railway company, without the leave of the Court, took proceedings under the Lands Clauses Act to obtain possession of lands under the control of a receiver appointed by the Court. Upon an *ex parte* motion they were restrained by injunction: *Tink v. Rundle* (1847), 10 Beav. 318.

(b) Urgency is not a condition to the exercise of the powers under sect. 85.

Illustrations.

(1) "I am of opinion that a railway company cannot take advantage of the powers given them by the 85th section of the Lands Clauses Consolidation Act to enter upon the lands of an owner of property, unless there exists such a state of circumstances as makes it imperatively necessary that they should do so": *per* Malins, V.-C., in *Field v. Carnarvon and Llanberis Ry.* (1867), 37 L. J. Ch. at p. 178.

(2) "Probably, in the absence of any authority, I should feel great difficulty in coming to any such conclusion as the Vice-Chancellor Malins there [*Field v. Carnarvon and Llanberis Ry.*, *supra*] expressed. The words of the 85th section require only a desire on the part of the company to enter and use the lands, and the very fact of the company exercising the powers given by the section is sufficient evidence of such a desire": *per* Fry, J., in *Loosemore v. Tiverton and North Devon Ry.* (1882), 22 Ch. D. at p. 32. "Can we impose that condition [the condition of urgency] on the exercise of the power when the Act has no words to that effect?": *per* Lord Selborne, L.C., at p. 46, *ib.*

(c) A company cannot, it seems, be restrained from exercising the powers given by sect. 85 because their capital has not been subscribed as required by sect. 16. Sect. 85 is not altered by sect. 16, and stands outside it.

Illustration.

The Swindon Railway Co. (acting under statutory powers) gave the Great Western Railway Co. notice to treat for the purchase, not of an easement or of any hereditament known to the law, but of a right created by statute for the protection of the G. W. Railway which related to certain crossings. Shortly afterwards the S. Company gave notice of their desire to enter upon and use the lands for the purpose in question, and also of their intention to apply to the Board of Trade to appoint a surveyor to determine the value of the right. This valuation was made, and the S. Company deposited the amount and entered into a bond under sect. 85 of the Lands Clauses Act. The G. W. Company applied for an injunction to restrain the S. Company from entering or continuing upon the lands mentioned in the notice to treat or from putting into operation any of the powers of the special Act or of the Lands Clauses Act as to the compulsory purchase of land, on the ground that the capital of the S. Company had not been subscribed as required by sect. 16 of the Lands Clauses Act:—*Held*, that the S. Company could not be restrained on this ground: *Great Western Ry. v. Swindon and Cheltenham Ry.* (1884), 9 App. Cas. 787.

(d) The promoters may enter under sect. 85, after giving notice of their intention to summon a jury, and they will not be restrained by injunction even though the works of the company would so change the appearance of the property that it would be impossible for the jury to form an opinion as to its original state.

Illustration.

A company, having offered 3,300*l.* for certain messuages and land required, served notice to treat upon the owners (who were tenants in common) and occupiers of the premises. The owners claimed 8,693*l.*, which the company declined to pay, and served notice of their intention to summon a jury. Some delay having taken place, the owners called upon the

company to summon a jury, and this the company undertook to do within a few days. The company, however, before doing so, executed a bond in the sum of 3,300*l.*, and paid a like sum into the bank to the account of the owners. The owners thereupon filed a bill for an injunction, restraining the company from taking possession prior to the inquiry before the jury. It was contended that the company ought to be restrained, for the works contemplated would so change the appearance of the property that it would be impossible for a jury to form an opinion as to its original state :—*Held*, that the company were justified in proceeding, and that an injunction could not be granted. An undertaking was, however, given by the company not to further interfere with the property until the warrant had been lodged with the sheriff, and to prosecute the warrant without delay : *Langham v. Great Northern Ry.* (1848), 1 De G. & Sm. 486.

(*e*) The power given to the promoters to use the land entered upon is intended to enlarge, and not to limit, the effect of possession.

Illustrations.

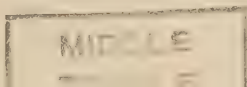
(1) The plaintiffs, trustees for sale under the will of B., having received notice to treat for certain property subject to the trusts, agreed to sell the property for 4,300*l.*, and to allow immediate possession upon the deposit at the Union Bank of the purchase-money in the joint names of vendors and purchasers, but the purchasers were not to be deemed thereby to accept the vendor's title :—*Held*, that this arrangement had an operation similar to that of sect. 85 of the Lands Clauses Act, and that the purchasers were entitled, upon depositing the purchase-money, not only to take possession, but to pull down the house, which was the object which the purchasers had in view : *Bolton v. London School Board* (1878), 7 Ch. D. 766.

(2) “ I observe that the Master of the Rolls and Cotton, L.J., appear to lay much weight on the words in the 85th section ‘enter upon and use,’ and to imply that the power ‘to use’ is a divisible power which continues to the end of the five years and no longer, and that, after the five years, the company cannot ‘use’ the land, and must give it back. I cannot so read the 85th section. The power to use is intended to enlarge, and not to limit, the effect of giving possession. The power ‘to enter and use’ appears to me to be so expressed in order to show that the company were not to occupy, as tenants, lands which they might have afterwards to give back *in statu quo*, and to recognise that the very object of their occupation was to enable them to convert, once and for all, the land to their own use as a thing that was never to go back to its former owner, and thenceforward to use it, as they might use their own land, in making a railway. The power to the company to enter and use appears to me to be equivalent to a power to convert to their own use, and this is completed as soon as the company enter on and appropriate the land ” : *per* Lord Cairns in *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. at p. 491.

(*f*) If an entry is made by mistake and possession is given up, the promoters cannot be compelled to pay the purchase-money into court.

Illustration.

T. was the rector of S., empowered by statute to sell the glebe lands or lay out the same for building purposes. The provisional committee of a railway company, who were seeking an Act of incorporation, contracted with T. for the purchase of a portion of the glebe which had been laid out for building, and T., as part of the contract, withdrew his intended opposition to the Bill. At the time of the agreement all the lands, except one field which was let to a tenant, were lying waste ; and after the agreement an agent of the company,



thinking that the latter had bought and paid for the land, agreed to let the unoccupied portion from week to week, and received a small sum from the tenants of that portion of the land, but, discovering his mistake, on T.'s remonstrance he put an end to the tenancy, and tendered to T. the rent received. It was not determined whether the railway would pass through the glebe land. Upon a motion that the company might be ordered to pay into court the amount of the purchase-money of the land :—*Held*, that although where a purchaser has taken and keeps possession he cannot retain it without paying the purchase-money into court, yet that in the present case, the agent of the company having entered by mistake and having quitted possession, the rule did not apply : *Tamlinson v. Manchester and Birmingham Ry.* (1840), 2 Rail. Cas. 104.

(g) If the promoters are empowered by their special Act to take temporary possession of land, they may do so without proceeding under sect. 85.

Illustration.

Sect. 12 of their special Act empowered the N. M. Railway to take land for the purposes of the Act, and to enter upon lands adjoining the railway and to dig and use materials obtained therein, they (the company) making full satisfaction for all lands to be so taken, used or injured, and for all damages by reason of the execution of all or any of the powers thereby granted. Sect. 53 enabled the company, upon payment, tender or deposit of the sums of money agreed upon or awarded, forthwith to make entry upon the lands, provided that, before such payment, &c., it should not be lawful for the company to enter upon such lands for any of the purposes of the Act. Sect. 54 provided that, before taking temporary possession of any lands, the company should agree with the owners or occupiers for an annual rent in respect thereof, and, if required, should give security for payment of compensation for any permanent injury which might be sustained. The company having entered upon lands of the plaintiff for the purpose of taking a subsoil to form an embankment, he filed his bill praying that they might be restrained from so doing until they should have agreed with the plaintiff for a fixed annual rent during their occupation of the land and given security for compensation :—*Held*, that the acts complained of were not within sect. 54, but were, by the proviso to sect. 53, brought within the conditions of sect. 12 : *Innocent v. North Midland Ry.* (1839), 1 Rail. Cas. 242.

(h) Before entering under sect. 85 the promoters must make provision for satisfying all interests in the land entered on.

Illustrations.

(1) W. was the lessee of a house and land for a term of twenty-one years from Christmas, 1842. On August 22nd, 1846, a company gave W. notice to treat, and W. claimed 2,350*l.* The parties being unable to agree upon the compensation due, the company, in August, 1848, gave W. notice of their desire to take possession and of their intention to have a surveyor appointed. The company first executed a bond for 740*l.*, but afterwards for the full amount claimed (*i.e.*, 2,350*l.*) and paid that sum into the bank. Upon an application by W. for an injunction restraining the company from proceeding with the works until proper compensation had been made to him as to his interest :—*Held*, that it was quite competent to the company to deal with W. in respect of his beneficial interest, and that, in complying with the provisions of sect. 85, it was necessary only to have regard to the particular interest of the party from whom the company were purchasing : *Willey v. South-Eastern Ry.* (1849), 1 Mac. & G. 58.

(2) A railway company requiring certain land which was subject to a mortgage, of which they were aware, gave notice to and proceeded to treat with the mortgagor alone.

Failing to agree upon the amount of compensation due to the mortgagor, the company paid the amount thereof, as determined by a surveyor, into court, but made no provision for compensation to the mortgagees under sect. 114 of the Lands Clauses Act, 1845. The company was restrained from proceeding until the value of the mortgagees' interest had been ascertained and paid or secured: *Ranken v. East and West India Docks* (1849), 12 Beav. 298.

(3) Promoters will be restrained from taking possession of lands until they have paid the compensation due to all who have interests in the lands of which notice has been given to the promoters: *Anderson v. Newry and Warrenpoint Ry.* (1849), 1 Ir. Jur. 11.

(4) "The company having settled with the tenants, took possession of the land. This I conceive (though it is a course, I believe, often pursued) was contrary to the provisions of the Act, for they had no business to take possession until they had settled with everybody": *per* Lord Cranworth, C., in *Inge v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 3 De G. M. & G. at p. 666.

(5) By an agreement for a tenancy, determinable by six months' notice, the tenants were to be entitled to remove any buildings erected by them during the tenancy. The land was required by a company, and notice to quit was given to the tenants. The buildings were not removed, and, after the expiry of the notice, the company took forcible possession without having given the tenants any notice to treat in respect of their interest or deposited the value of the interest:—*Held*, that the tenants had a sufficient interest in the premises after the expiration of the notice to entitle them to an injunction against the continuance in possession of the company: *Rogers v. Hull Dock* (1864), 34 L. J. Ch. 165.

(6) Where a railway company proposed to take possession of property which was subject to a mortgage payable by means of an annuity secured by a demise of the lands:—*Held* that, before so doing, the company were bound to satisfy the claim of the mortgagee: *University Life Assurance Society v. Metropolitan Ry.* [1866] W. N. 167.

(7) B. was the occupier of certain land under a building agreement which was determinable if the buildings were not completed by November 30th, 1885. In 1880 he was told of the promotion of a Bill for a railway which would affect the land. His landlord's agent thereupon advised him to suspend building operations. In 1883 the company obtained their Act, and in that year purchased from B.'s landlord the part of the land required. The purchase was subject to the building agreement. In September, 1884, the company gave B. notice to treat. B. sent in no claim, and in 1886 the company took possession without complying with the provisions of sect. 85:—*Held*, that the company took subject to B.'s interest, as B., by reason of the agent's direction, could claim not to be ejected by his landlord at the end of the term until he had had a reasonable time, after notice, to complete the building: *Birmingham Land Co. v. London and North-Western Ry.* (1888), 40 Ch. D. 268.

(k) If, after payment for lands by the company to persons served with notice to treat the company have notice of outstanding interests, they will not be allowed to retain possession unless they undertake to satisfy such outstanding interests.

Illustration.

The E. C. and L. and B. Railway Co.'s were duly empowered to make a railway and to take certain lands for that purpose. After notice to treat given to the lessee in possession of the lands, the companies, with his consent, entered into possession and began the necessary works. The lessee stated nothing as to his interest, and no information was

given to the companies of the interests of the plaintiffs. Afterward, the companies paid purchase-money to, and obtained a conveyance from persons who claimed to be owners of the property and to be entitled to convey it. Other persons who claimed to be part-owners, but who had had no notice to treat, and who were ignorant of the foregoing events, then came forward, and together with the lessee, denied the right of the first-named persons to grant a conveyance. Upon motion for an injunction by the new claimants, the Court refused to interfere with the possession by the companies, but required them to undertake to proceed at once to determine the value of the land, to undertake to pay the value when determined, and to give the new claimants the usual bond under sect. 85 of the Lands Clauses Act, and thereupon directed an inquiry whether the new claimants could make a title without prejudice: *Alston v. Eastern Counties Ry.* (1855), 1 Jur. (N.S.) 1009.

(l) A suit for specific performance by the person from whom the company agreed to take the land will not, in such circumstances, be stayed, nor can the deposit be withdrawn.

Illustration.

The Commissioners of Public Works and Buildings having taken a house under the Lands Clauses Act and paid a deposit, a jury found 1,110*l.* to be the value of the fee simple, the owner having claimed a fee simple. It turned out that the owner had only ten years of an old lease, and, the Commissioners refusing to complete, he filed a bill for specific performance, and moved for an injunction to restrain the pulling down of the house. An inquiry as to the title being directed, the chief clerk found a ten years' title, and liberty to apply having been reserved, the Commissioners moved to stay the suit, for the return of the deposit, and for payment of the costs by the plaintiff. The motion was refused with costs: *Gedye v. Commissioners of Public Works* (1868), 19 L. T. 82.

(m) A general statutory requirement, as, for instance, to provide accommodation for labouring classes displaced by the taking of land, need not be fulfilled before the promoters proceed to take steps to acquire lands.

Illustration.

By an Act 40 & 41 Vict. c. cccxxv., incorporating the greater part of the Lands Clauses Act, the M. Board of Works were authorised to make new streets and other works, and for the purposes were given power to acquire property, subject, however, to a Secretary of State being satisfied, in every case before the Board should take more than fifteen houses, that adequate accommodation for the labouring classes thus displaced had been provided elsewhere. The Board gave S. notice to treat with respect to more than fifteen houses, occupied by persons of the labouring classes. S. sent in his claim, with notice that it was delivered without prejudice to any question as to the right of the Board to exercise their powers before complying with the Act with regard to the provision of adequate accommodation elsewhere. The Board then served notice of their intention to summon a jury. It was admitted that the conditions of the above-mentioned proviso had not then been fulfilled. S. sought to restrain the Board from proceeding on their notices until they had complied with the proviso:—*Held* (Cotton, L.J., *diss.*), that the conditions precedent to taking S.'s land were conditions which the Board were able and compellable to comply with, and the land in question was land which the Board were "authorised to purchase or take" within the meaning of sect. 18 of the Lands Clauses Act, and that they were entitled to serve notice to treat and summon a jury without first complying with the proviso: *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142.

"It appears to me plain that, unless we find something to take away the authority given by the 5th section, the Board are authorised to take these houses. If this authority is taken away at all, it must be taken away by the proviso to sect. 33. I have already said that they are not in express terms prohibited from proceedings with a view to taking the houses; if, therefore, they are so prohibited at all, it must be by implication. But why should such an implication be made? A proviso that you shall not take does not prevent your proceeding with all the steps preliminary to taking. It seems to me that it is a fallacy to say that the Board are not authorised to take the houses because a condition precedent to completing their title has not been complied with, where the condition depends on an act which the Board themselves can do. As regards any lands which the Board is entitled to purchase, it cannot under the Act of Parliament enter upon them or use them without paying or depositing the purchase-money, or making a deposit and giving a bond under the 84th section of the Lands Clauses Act. The enactment that they cannot be entered upon or used without performance of the preliminary condition does not prevent the Board from being authorised to take them within the meaning of the Lands Clauses Act. The Board cannot get a conveyance nor, except in the case provided for by sect. 84, enter upon or use them without payment or deposit of the purchase-money": *per* Jessel, M.R., at p. 164, *ib.*

(n) Promoters who are not proceeding under the powers of the Lands Clauses Act will not be permitted to take possession, pending an action for specific performance.

Illustration.

The M. Board of Works, acting under the powers of an Improvement Act, served notice to treat on B. in respect of a leasehold held for twenty-one years from 1883, determinable by either party at the end of seven or fourteen years. B. agreed to sell his interest to the Board at a fixed price, the agreement stating that B.'s interest was the residue of a term of twenty-one years from 1883. On the delivery of the abstract the Board claimed an abatement in the price on account of the possibility of earlier determination of the lease. B. brought an action for specific performance. Statement of claim, defence and reply were delivered. The Board had purchased the freehold subject to the lease. The Board moved for liberty to pay the agreed price into court to abide the event and to be let into possession:—*Held* that, as the Board had not acted under sects. 76 or 85, they could not be let into possession under the Lands Clauses Act, and as the contract did not provide for possession before completion, the Court had no jurisdiction to modify the contract in that way: *Bygrave v. Metropolitan Board of Works* (1886), 32 Ch. D. 147.

(o) The promoters before entering under sect. 85 must deposit the value of the whole of the land included in the notice to treat.

Illustrations.

(1) A railway company, acting under their statutory powers, gave notice of their intention to take ten pieces of land, but afterwards entered upon only eight of the pieces, and had them valued and deposited the amount of the valuation in the bank, and gave security by bond under their seal, but without sureties, under sect. 85 of the Lands Clauses Act:—*Held*, that the company could not enter upon less than the whole of the lands comprised in the notice to treat and deposit the value of and give security for a less quantity: *Barker v. North Staffordshire Ry.* (1848), 2 De G. & S. 55.

(2) S. was tenant for life of a water-mill and to the use of a certain stream. The Y. Corporation, under statutory powers which incorporated the Lands Clauses Act, gave S. notice of their intention to divert and appropriate the whole of the stream. By agreement

purporting to be made under the special Act the amount of compensation was referred to surveyors and assessed. The corporation refused to pay, on the ground that it was *ultra vires* to agree to make compensation for the whole stream, and that their powers only extended to give compensation for the damage done from time to time by the partial diversion of the stream :—*Held*, that the corporation had power under their Act to divert the whole stream, and that as they had given notice of their intention to divert the whole, they had power and were bound to give compensation for the whole, and not merely for the damage from time to time caused by the partial diversion : *Stone v. Yeovil Corporation* (1876), L. R. 2 C. P. D. 99.

(3) A railway company gave notice to treat for about six acres of land belonging to F., but afterwards F.'s surveyor suggested alterations which would make it unnecessary for the company to take more than about four acres, and he signed an agreement which provided for this amount only and for the payment of 2,000*l.* as the price thereof. The company paid the 2,000*l.* into court and took possession under sect. 85 :—*Held*, that such entry upon the land was illegal, on the ground (*inter alia*) that the amount deposited was for the smaller area of land, and the surveyor not being the agent of F. for the purpose of making this alteration : *Ford v. Plymouth, Devonport and South-Western Junction Ry.* [1887] W. N. 201. See other illustration of this case, *ante*, p. 568.

(p) Upon the same principle, if the notice to treat is for part of a house or other building or a manufactory, and a valid counter-notice is given under sect. 92, the promoters before entering under sect. 85 upon a part of the premises must deposit the value of the whole, and trade fixtures must be included in the valuation (see *post*, sect. 92).

(q) In cases where there is a right conferred on the promoters by the special Act to take a part only of property provided there is no material detriment to the remainder, the promoters need only deposit the value of the part unless and until the owner has obtained a finding by a jury or arbitrator that there will be material detriment to the remainder (*post*, sect. 92).

(r) Compensation for minerals should be excluded from the estimated value of the land, unless the promoters desire to take possession of the minerals.

Illustrations.

(1) A railway company gave Y. notice to treat for certain land and took possession by virtue of sect. 85. The company and Y. afterwards appointed an arbitrator, who was, by the terms of the reference, to assess the purchase-money and the compensation due. He found one sum as purchase-money and another as compensation, and a third sum as compensation for minerals. The company petitioned for payment out of their deposit :—*Held*, that as the claim for the value of the minerals arose under sects. 78 and 81 of the Railways Clauses Act, which Act does not require a bond to be given in respect of such compensation, and the bond was only given to secure the purchase-money and compensation, the company by paying the sums assessed on that behalf had satisfied the condition of the bond, and were entitled to have the deposit returned : *Ex parte Neath and Brecon Ry.* (1876), 2 Ch. D. 201.

(2) The T. Railway Co. entered on L.'s land under sect. 85. Their notice did not include minerals. The railway was carried over L.'s land by an embankment. The company dug

clay of merchantable value on L.'s land and used it on their works elsewhere :—*Held*, that the landowner had a right of action for the value of the clay, and was not obliged to proceed under sect. 6 of the Railways Clauses Act : *Loosemore v. Tiverton and North Devon Ry.* (1882), 22 Ch. D. 25.

(3) A railway company gave a landowner notice to treat in respect of certain land, including the minerals thereunder, except coal :—*Held*, that the time for assessing the compensation for the coal was determined by sects. 77 to 85 of the Railways Clauses Act, and was when the workings approached the coal under the railway, and that the value of the coal must be excluded from the compensation : *In re Gerard (Lord) and the London and North-Western Ry.*, [1895] 1 Q. B. 459.

(s) Easements are included in the word “lands” in this section where there is express power to take them.

Illustration.

“I turn to the interpretation clause of the Act, and I find that the word “lands” is declared to extend to tenements and hereditaments of any tenure, and I ask myself whether this easement, or the right to construct this tunnel, is or is not a hereditament of some tenure. It appears to me to be plainly a hereditament. It is a right to enter upon the land to construct a tunnel, and to enjoy and use that land for particular purposes; and, therefore, if the matter stood there, it would appear to me to be plainly within the interpretation clause. But then it is said (and said with perfect truth) that there are decisions which show that generally easements are not included within the word “lands” in the 85th section. But why are they not included? Not because they are not hereditaments within the meaning of the 85th section, but simply because there is usually no power to take an easement”: *Per Fry, J.*, in *Hill v. Midland Ry.* (1882), 21 Ch. D. 143.

(t) Where there is express power to acquire compulsorily an easement only, the promoters may enter under this section upon depositing the value of the easement only.

Illustration.

A railway company was entitled by a special Act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land :—*Held*, that the company might enter upon the land for the purpose of making the tunnel under sect. 85 of the Lands Clauses Consolidation Act upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land : *Hill v. Midland Ry.* (1882), 21 Ch. D. 143.

III. The bond and sureties, valuer and valuation.

(a) The following are illustrations of cases in which the bond given was held to be bad.

Illustrations.

(1) A railway company, after fruitless negotiation, and after having given notice of their intention to summon a jury under sect. 68 of the Lands Clauses Act, to settle the amount of compensation to be paid to A. and B., the tenants in common of a piece of land required for the purposes of their railway, made entry under sect. 85 of the same Act. They paid the ascertained value into the joint account of A. and B., and delivered a bond conditioned to pay on demand to A. and B., their executors, administrators or assigns, or deposit on demand, &c., such purchase-money or compensation as might be found to be payable :—*Held*, that the payment and the bond given in the above form to persons

tenants in common of land, although represented by one solicitor, and acting together, were irregular; and that the words "on demand" inserted in the condition for payment was not a compliance with the terms of sect. 85 of the Lands Clauses Act: *Langham v. Great Northern Ry.* (1847), 5 Rail. Cas. 263.

(2) A railway company gave a landowner notice of their intention to take portions of his land for the purposes of their railway, and negotiations were begun, pending which the company, without giving notice, proceeded under sect. 85 to have the lands valued, and caused a bond to be delivered conditioned for payment on demand of the purchase-money to the plaintiff, or for the deposit thereof, on demand, in the bank; and on the bond was endorsed a receipt of the Accountant-General, by which he certified that he had received the sum mentioned in the bond, and had placed the same to the credit of "*Ex parte* the G. N. Railway Co., *Er parte* T. P." :—*Held*, that the words "on demand" inserted in a bond given by a company to a landowner under sect. 85 rendered such bond informal; and that the plaintiff was entitled to an injunction: *Poynder v. Great Northern Ry.* (1847), 5 Rail. Cas. 196.

(3) It appeared that the bond given to the plaintiff under sect. 85, instead of being conditioned for "payment to the party or deposit in the bank for the benefit of the parties interested," was conditioned for "payment to the party, his heirs, executors, administrators, or assigns, and for deposit in the Bank of England or otherwise, for the benefit of the parties interested," &c. :—*Held*, that the bond failed to comply with the section and was bad, by reason of the insertion of the words "or otherwise": *Hosking v. Phillips* (1848), 3 Ex. 168.

(4) The defendants requiring land belonging to D., gave notice to treat under sect. 18, and also a bond, under sect. 85, containing a condition that if the company should pay to "the four plaintiffs or some or one of their heirs, executors, administrators, or assigns," &c. The bond was held to be bad and an injunction was granted to restrain the defendants from continuing in possession of the lands or constructing a railway thereon: *Daubney v. Manchester, Sheffield and Lincolnshire Ry.* (1848), 10 L. T. (O.S.) 283.

(5) Where the words were "if the said railway company or their successors shall at any time hereafter pay unto the said Wm. Cotter," &c. :—*Held*, that such words as "shall at any time hereafter" invalidated the bond: *Cotter v. Metropolitan Ry.* (1864), 12 W. R. 1021.

In the following case the bond was held to be good.

Illustration.

The condition of the bond was for payment by the company or their sureties to "the said R. Willey, his executors, administrators or assigns, or for the deposit in the Bank of England for his or their benefit, as the case might require, under the provisions of the Lands Clauses Act, all such purchase-money or compensation, &c." :—*Held*, that where a company treat with a claimant as the party interested in the land it is sufficient that the bond to be given under the 85th section secures payment of the compensation money to "the claimant, his executors," &c., without referring to "the parties interested in the premises": *Willey v. South-Eastern Ry.* (1849), 18 L. J. Ch. 201.

(b) If the entry was originally wrongful owing to some irregularity, the company is not precluded from continuing in possession if they afterwards do all that was required to make the original entry rightful.

Illustrations.

(1) The Great Western Railway Act provided for the payment into the Court of Exchequer of the money agreed or awarded to be paid for the purchase of lands to which a title should not be made out to the satisfaction of the company. It also provided that, upon payment, tender or deposit of such purchase-money, the company should be entitled to enter upon such lands. The company agreed with a landowner for the purchase of lands on the line of the railway, and before acceptance of the title, or payment, tender or deposit of the purchase-money, entered upon the land :—*Held*—(1) that the entry was illegal ; (2) that this was not a case within the Act ; that, upon payment of the purchase-money into the court in which the bill had been filed, the company was entitled to enter ; and that an injunction which had been obtained *ex parte* should then be dissolved : *Hyde v. Great Western Ry.* (1839), 1 Rail. Cas. 277.

(2) The condition of a bond given by a railway company under sect. 85 being *held* to be bad, an injunction was granted against the company till a proper bond should be executed : *Poynder v. Great Northern Ry.* (1847), 2 Ph. 330.

(3) A railway company, requiring a certain piece of land held by W. for a term of thirteen years unexpired, gave him notice to treat, and ineffectual attempts were made to settle the price by agreement. Nothing further was done until two years after, when the company gave a bond, deposited the estimated value, and entered into possession. These proceedings not being in proper form, the company afterwards deposited the sum claimed by W. and delivered a bond for that amount. W. filed his bill for an injunction :—*Held*, that an entry into the possession of land begun wrongfully does not preclude a company from continuing in possession when they have done all that was originally required to make the entry rightful : *Willey v. South-Eastern Ry.* (1849), 6 Rail. Cas. 100.

(4) Knight Bruce, V.-C., without reference to his own opinion as to the validity of *ex parte* proceedings under sect. 85, said he would follow the decision in *Poynder v. Great Northern Ry.* (*supra*) upon the point in *Langham v. Great Northern Ry.* (1849), 16 L. J. Ch. 437.

(5) An injunction was sought to restrain a railway company from entering on land before payment of the purchase-money. They remained in possession three months, and then paid the purchase-money :—*Held*, that they must pay the costs of the suit : *Kensington (Lord) v. Metropolitan Ry.* (1866), 14 W. R. 754.

(c) When a company has complied with the provisions of sect. 85, the Court may, in the event of the non-performance of the condition of the bond, order payment out of the deposit to the landowner.

Illustration.

A railway company being desirous of taking possession of certain land, paid into the bank its estimated value, 1,514*l.*, and executed a bond under sect. 85. The sum of 1,653*l.* was afterwards awarded to the owner, but the company failed to pay him the balance of 139*l.* He thereupon presented a petition asking that the deposit might be paid out to him in part-payment of the amount awarded, and for his costs, he undertaking to convey upon payment :—*Held*, that the owner could present such a petition if the condition of the bond was not fulfilled : *In re Mutlow's Estate* (1878), 10 Ch. D. 131.

(d) Two sureties are required in every case as well as the bond.

Illustration.

A railway company gave notice to treat for ten pieces of land. They afterwards entered upon eight pieces only, and, after valuation, deposited the amount of such valuation

in the bank, and gave security by bond under their corporate seal, but without sureties, to the landowner :—*Held*, that two sureties were required as well when the bond is given by a corporation as by an individual : *Barber v. North Staffordshire Ry.* (1847), 2 De G. & Sm. 55.

(e) The Board of Trade will only hear an objection to the sureties under the Railway Companies Act, 1867, s. 36, if the parties differ.

Illustration.

“Lastly, there has been this contention, that the Board of Trade did not hear any objections by the plaintiff to the sureties, and that, by the 36th section of the Railway Companies Act, 1867, they are required to hear such objections. The facts seem to me to be entirely against that contention when it is borne in mind that the Board of Trade are to hear the objection only if the parties differ. The plaintiff had notice on December 11th, 1879, who the intended sureties were, and he never uttered the slightest expression of dissent, or manifested any desire to differ from the selection of sureties until he wrote the letter of March 18th, 1880, when he said he supposed he could be heard before the Board of Trade. But that letter did not reach the defendants until after the bond had been given by the sureties” : *per Fry, J.*, in *Loosemore v. Tiverton and North Devon Ry.* (1882), 22 Ch. D. at p. 40.

(f) In the case of the Crown the necessity of sureties must depend upon the particular statute under which their powers arise.

Illustration.

In the Post Office (Land) Act, 1881 (44 & 45 Vict. c. 20), it is provided by sect. 3 (b) that the bond required by sect. 85 of the Lands Clauses Consolidation Act, 1845, shall be under the seal of the Postmaster-General, and shall be sufficient without sureties. See also the Military Lands Act, 1892 (55 & 56 Vict. c. 43).

(g) The promoters may proceed *ex parte* to have a surveyor appointed.

Illustration.

A railway company proceeding under sect. 85 need not give notice to the owner of the land sought to be affected by the proceedings of an application to two justices [now the Board of Trade] for the appointment of a surveyor : *Bridges v. Wilts, Somerset and Weymouth Ry.* (1847), 16 L. J. Ch. 335.

(h) As to qualification of the surveyor appointed to make the valuation.

Illustration.

“As to the appointment of the same person to value the land who had formerly acted on behalf of the company, although he did not like the appointment of the same person to act as the general valuer who had been specially appointed for the company, and acted on their behalf during their negotiation with the plaintiffs, yet he could not judicially interfere on that account” : *per Shadwell, V.-C.*, in *Langham v. Great Northern Ry.* (1847), 16 L. J. Ch. at p. 440.

(k) The valuation should include compensation for severance.

Illustration.

"I am of opinion that such valuation [*i.e.*, under sect. 85] should include all that to which by agreement, or by a jury, or by an arbitrator the landowner would be found to be entitled; and therefore that it must include compensation for severance, &c., as well as the mere value of the land itself. If it did not do so, the section might work great injustice, for in many cases the value of the land is inconsiderable compared with the amount of compensation for severance to which the landowner would be entitled": *per* Malins, V.-C., in *Field v. Carnarvon and Llanberis Ry.* (1867), L. R. 5 Eq. at p. 192.

NOTE.—This case was questioned, but upon another point, by Fry, J., in *Loosemore v. Tiverton and North Devon Ry.* (1882), 22 Ch. D. at p. 39.

(l) Application of sect. 36 of the Railway Companies Act, 1867.

Illustration.

A railway company served F. with notice to treat for certain land in February, 1865. F. sent in a claim for the value of the land, for severance, and for deterioration of the remainder of his land. In July, 1865, the company had the land valued by a surveyor, but nothing more was done until December, 1867, when the company deposited the amount of the valuation, with bonds, and entered:—*Held*, that the entry was illegal, as the valuation ought to have been made by a surveyor appointed by the Board of Trade under sect. 36 of the Railway Companies Act, 1867: *Field v. Carnarvon and Llanberis Ry.* (1867), L. R. 5 Eq. 190.

(m) A valuation based merely on a view of the exterior of the premises is not a compliance with the requirements of the section as to the determination of the value of such premises.

Illustration.

C. was a lessee for years. "The M. Railway Co. gave him the usual notice to treat. C. claimed 3,650*l.*, and demanded a jury. The company gave notice of a jury, and the day of trial was fixed. The company gave a bond for 200*l.*, reciting that their surveyor had determined that to be the value, and the condition providing for payment "at any time hereafter." The surveyor had only seen the premises from the outside:—*Held*, that the valuation was not a proper one, and that the bond was not in proper form, and that an injunction must go till a proper valuation was made and a proper bond given, or until the jury had assessed and the company paid the compensation: *Cotter v. Metropolitan Ry.* (1864), 12 W. R. 1021; and see *ante*, p. 578, Illustration (5).

(n) Where a surveyor has been properly appointed and makes his valuation, the Court will not restrain the promoters from entering on the land on the allegation that the valuation is inadequate.

Illustration.

The B. District Council gave R. notice to treat, and applied to the Board of Trade to appoint a surveyor for the purpose of speedy entry under sect. 85. The surveyor fixed the value at 1*l.*; R. was claiming 6,000*l.*:—*Held* that, as the valuer had sworn he had in fact considered the whole matter, the Court had no jurisdiction to restrain the council from

entering on the land on the ground that the valuation was grossly inadequate : *River Roden Co. v. Barking Town District Council* (1902), 18 T. L. R. 608.

(o) The Court will not restrain the promoters from proceeding with their works on the ground that the surveyor was appointed by justices of a county adjacent to where the lands are.

Illustration.

A railway company having, under sects. 59 and 85 of the Lands Clauses Act, obtained an assessment of compensation for the plaintiff's interest in certain lands, by means of a surveyor appointed by two justices, took possession and proceeded with their works :—*Held*, that it was not an adequate ground for granting an injunction to restrain the execution of the works that the proceedings to assess compensation had been taken before two justices of a county adjacent to that wherein the lands were situate : *Wilson v. Newry, Warrenpoint and Rostrevor Ry.* (1847), 10 L. T. (O.S.) 211.

IV. Time of payment into court. Payment of the difference between the valuation and the compensation.

(a) The money should not be paid into court until after the valuation is signed.

Illustration.

The valuation made by a surveyor in pursuance of sect. 85 was dated June 12th, but the money was paid into court and the bond given on June 10th. It was argued for the plaintiff that a payment could not be so made within sect. 85 :—*Held*, that there was nothing in the Act to require a decision that the money had not been properly paid into court, but that opportunity should be given to explain the dates and to show that the amount had been fairly and properly determined, and that it was by some accident that the valuation was not signed until after the money had been paid in : *Stamps v. Birmingham, Wolverhampton and Stour Valley Ry.* (1848), 7 Hare, 251.

(b) The ascertainment of the compensation is not an exercise of compulsory powers, and may be effected after the expiration of these powers.

Illustration.

A railway company having complied with the provisions of sect. 85 of the Lands Clauses Act, 1845, entered upon certain lands. No steps were taken to fix the compensation till the compulsory powers of the company had expired. The owner then brought an action of ejectment :—*Held*, that the ascertaining of the compensation was not an exercise of compulsory powers, and that it was for the owner to have taken steps in the matter, in accordance with sect. 68 : *Doe d. Armistead v. North Staffordshire Ry.* (1851), 16 Q. B. 526.

(c) The difference between the valuation and the amount afterwards found by the arbitrators must be paid into court forthwith.

Illustrations.

(1) A railway company, acting under sect. 85, deposited in the bank to the credit of the owners the sum of 250*l.* before taking possession. The purchase-money was afterwards determined by arbitration to be the sum of 300*l.* The Accountant-General declined

to receive less than the 300*l.*, under sect. 69 of the Lands Clauses Act. A petition was presented by the owners, and consented to by the company, for payment into court of the 50*l.*, to the same account as the 250*l.*, and for investment of the whole and for payment of the dividends. Wood, V.-C., made the order asked for : *Ex parte London, Tilbury and Southend Ry.* (1853), 1 W. R. 533.

(2) A railway company took possession, under sect. 85, of land belonging to A., and paid into court 868*l.* as the value of the land. The value was afterwards ascertained by an arbitrator to be 1,227*l.* :—*Held*, that the difference must be forthwith paid into court by the company : *Ashford v. London, Chatham and Dover Ry.* (1866), 14 L. T. 787.

NOTE.—As to payment of interest on purchase-money, vendor's lien for unpaid purchase-money, enforcement of lien, &c., see sect. 6, *ante*.

V. Remedy of owner.

(a) The remedy of the owner is by action to recover possession if—

The company enters upon land not included in the notice to treat ; or if

The company takes possession of land without dealing with the true owner ; or if

The company has no power to take the land in question.

Illustrations.

(1) By a railway Act it was provided that the company should make the railway, &c., on or through the lands defined on the maps or in the books of reference, unless land had been omitted by mistake, and the mistake certified by two justices ; also that the company should not deviate more than 100 yards from the line delineated on the map ; that when damage done to a mansion was the subject of inquiry, such question should be tried by a special jury ; and, lastly, that no proceedings under the Act should be removed by *certiorari*. The company were said to have exceeded their powers—(1) by making the railway through a piece of land not included in the plan or book of reference and not certified to have been omitted by mistake ; (2) by deviating more than 100 yards from the line delineated ; (3) the inquisition related to damage done to a mansion, and did not purport to have been taken by a special jury :—*Held*, that the proper remedy for this excess of jurisdiction was by action of trespass, and the Court refused to grant a *certiorari* : *R. v. Bristol and Exeter Ry.* (1838), 11 A. & E. 202, *n.* ; 52 R. R. 314.

(2) After a railway company had purchased a piece of land from A., who was mentioned in the book of reference as the owner of it, B., a neighbouring owner, part of whose land had also been taken, claimed to be the owner of the land acquired from A., and filed a bill for an injunction to restrain the company from continuing in possession and committing waste on it :—*Held*, that an injunction must be refused, the claimant's remedy being by ejectment : *Webster v. South-Eastern Ry.* (1851), 1 Sim. (N.S.) 272.

(3) A railway company took certain land not included in the notice to treat which they had given, and constructed certain works upon it. The plaintiffs claimed this land, but this claim was disputed by the company. The plaintiffs thereupon proceeded to interrupt and pull down some of the works :—*Held*, that the plaintiffs' remedy was by ejectment, and that, not having applied for an injunction to restrain the proceeding with the works, they were not now entitled to an injunction : *Lind v. Isle of Wight Ferry* (1862), 7 L. T. 416.

(4) F. was the owner of a piece of land in Lot Mead, which was about ten and a half acres in area, and C. was the owner of nine acres in the mead. C. was also tenant of the whole, paying F. rent for her portion, which was about an acre in extent. A railway company took possession of the whole of Lot Mead, and sought to ascertain the position of F.'s portion. C. ultimately conveyed to the company 10a. 2r. 13p. or thereabouts, reserving 1a. 0r. 4p. and 1a. 0r. 25p., the position and boundaries of which were then unknown, and which belonged to F. and to J. and others. In 1868 S., who claimed under F., brought an action of ejectment for "two and a half acres or thereabouts" in Lot Mead (for which the company had not paid). S. obtained first judgment and then possession. The railway had been constructed over the land, and the company produced a notice to treat, given to F. in 1856, and gave notice of their intention to proceed thereunder. S. filed his bill to restrain them :—*Held* that, in the circumstances, the company were not entitled to proceed under the notice to treat; and S. submitting to have the land valued, and the company preferring such a decree to an injunction, a decree was made for an inquiry as to the present value of the land, and the mesne profits for six years and for payment : *Stretton v. Great Western Ry.* (1870), L. R. 5 Ch. 751.

(b) If the company do not fulfil the requirements of sect. 84 and 85 they may be restrained by injunction from continuing their works and retaining possession. This is also the case if the company obtains possession from a tenant without satisfying all the interests in the land.

Illustrations.

(1) A railway company having served notice to treat and been furnished with a title (a claim for 500*l.* by way of compensation being also made), obtained possession from the occupying tenant and began the works without paying the money or lodging it in court and giving security as the Act requires. An injunction was granted restraining the company from proceeding with the work and compelling them to restore the land to its former state—the injunction not to issue on the company's undertaking to lodge the sum claimed and give the bond required : *Armstrong v. Waterford and Limerick Ry.* (1846), 10 Ir. Eq. R. 60.

(2) A railway company entered upon land and dug a line along it without the consent of, and without having given notice to, the owner, whereupon he filed his bill for an injunction. The company having stated that they entered upon the land for the purpose only of making a survey, and that they did not intend to go further without giving the requisite notices, the Court declined to make any order upon the motion, but reserved the costs : *Fooks v. Wilts, Somerset and Weymouth Ry.* (1846), 4 Rail. Cas. 210.

(3) A company having entered upon land without the owner's consent, and without paying the compensation money or giving a bond under sect. 85 of the Lands Clauses Act, an injunction was obtained against them :—*Held*, that the company must pay the costs of a motion to dissolve the injunction upon their having paid the compensation money into court and given a bond : *Woodard v. Eastern Counties Ry.* (1855), 3 W. R. 330.

(4) A railway company, under the misapprehension that a tenant for life was owner in fee of certain land, entered into an agreement with his supposed agent under sect. 84 of the Lands Clauses Act and took possession of the land, on which they constructed their railway. On a bill by the remaindermen and mortgagees, the Court granted an injunction to restrain the company from retaining possession : *Perks v. Great Wycombe Ry.* (1862), 3 Giff. 662.

(5) R. was tenant from year to year under an agreement which provided that in case R. should erect any buildings on the land, he might remove them during his occupation or

otherwise. He was to have a beneficial interest in them, and was, if required to give up possession before the expiration of twenty years, to be paid one-twentieth part of the amount expended on them for each remaining year of the unexpired term of twenty years. A company under statutory powers, incorporating the Lands Clauses Act, purchased the interest of R.'s lessor and required her to give notice to R., which was done. R. did not remove the buildings, and continued in possession after the expiration of the notice. The company took forcible possession. R. filed a bill to restrain the company from continuing in possession :—*Held*, that R. was entitled to such a beneficial interest as entitled him to compensation : *Rogers v. Hull Dock* (1864), 34 L. J. Ch. 165.

(6) B. was the occupier of land under a building agreement determinable if the buildings were not completed by November 30th, 1885. In 1880 he was informed of the promotion of a Bill for a railway which would affect the land. B. thereupon had an interview with his landlord's agent, who told him to suspend operations until the result of the railway scheme was known. No express agreement to extend the time for building was arrived at. In July, 1883, the railway company, having obtained their powers, purchased from the landlord the part of the land required, the purchase being expressly subject to the building agreement. B. sent in no claim, and in January, 1886, the company took possession without making a deposit or giving a bond, B. thereupon sought an injunction and a declaration that the building agreement was subsisting, and that he was entitled to have his interest assessed on that footing :—*Held*, that the building agreement gave B. sufficient interest to entitle him to the declaration asked for : *Birmingham Land Co. v. London and North-Western Ry.* (1888), 40 Ch. D. 268.

(c) Effect of *laches*. If the owner takes no action for a long period, an injunction may be granted to prevent his interfering with the working of the railway or the execution of the works, provided that the promoters are ready to make proper compensation.

Illustrations.

' (1) By an Act 34 Geo. III. c. cix., a company was empowered to make a canal through lands belonging to B. and P. Part of this land was under lease to M. The Act provided that upon payment of the compensation found due, the company might enter upon the lands, which should then vest in the company. An arrangement was made with B. as to compensation, but not with P. The canal was constructed "with the full consent and approbation of and in accordance with the wishes of P.;" and it was enjoyed until the expiration of the lease (granted by P.) in 1844. The representatives of P. then recovered, at law, the land taken for the canal :—*Held*, in equity, that P., having thus sanctioned the formation of the canal, was not entitled to resume possession, but only to fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794 ; *held also*, that persons who had bought P.'s property with notice in the conditions of sale as to the canal were equally bound by the same equity : *Beaufort (Duke) v. Patrick* (1853), 17 Beav. 60.

(2) Where an Act of Parliament authorised the construction of a railway, upon making compensation to the owners of the land taken, and the railway was made without the authority of the owner of the land and was afterwards used for fifteen years with his knowledge, an injunction was granted to restrain the owner's interference with the working of the railway : *Mold v. Wheatecroft* (1859), 27 Beav. 510.

(d) Where the purchase-money for the land is not paid by the promoters the Court may order delivery up of the land unless payment is

made within the time limited by the Court, even though the possession is taken by consent. The company, however, cannot be treated as trespassers, and each case must be dealt with upon its own facts.

Illustrations.

(1) The owner of land upon which a railway company, acting under statutory powers, are about to enter is not entitled to an interlocutory injunction to restrain them from so entering, if by his silence and conduct he has permitted the company to carry on works upon the supposition that they were entitled to enter upon and take the land : *Greenhalgh v. Manchester and Birmingham Ry.* (1838), 4 Myl. & Cr. 784 ; 45 R. R. 393.

(2) A railway company entered, without notice or leave, upon lands belonging to T., who sought to restrain them from digging away a part of one field and depositing it on a certain other field ; but as it appeared that there had been a disposition on the part of T. to treat, and as it was shown by affidavit that the steps taken by the company were necessary for the public safety, the injunction was refused upon an undertaking by the company to pay into court the probable value of the land taken : *Tower v. Eastern Counties Ry.* (1843), 3 Rail. Cas. 374. A subsequent treating with a railway company will be deemed by the Court a waiver of objection to proceedings, the subject of the treaty, although such proceedings are not, in fact, authorised by the railway Act : *ib.*

(3) Land belonging to L. being required by a railway company for their undertaking, L.'s consent was asked for and obtained, enabling the company to enter upon the land and begin to set out the line of their railway. The said consent was alleged by L. to be qualified, but by the company to be general. The company entered and began their works :—*Held*, that the Court would not interfere by injunction to stop the works, if justice could be done by compelling the company to pay for the land, but would order the approximate value to be deposited until the amount had been determined : *Langford v. Brighton, Lewes and Hastings Ry.* (1845), 4 Rail. Cas. 69.

(4) A railway company had power, under a special Act, to purchase lands for their undertaking by agreement with the landowner, or on assessment of the value by a jury. If the landowner refused to accept the sum agreed upon or awarded, the company were authorised to deposit it in the bank to the credit of the party entitled, and thereupon the interest in the land was to vest absolutely in the company. They were not to enter upon any lands without having paid or deposited the purchase or compensation money unless the owner consented ; but, subject thereto and to other provisions, they were empowered to make and maintain the railway in the line and upon the lands described in the plans and books of reference. The company required certain lands of H. for the purposes of their works, and it was agreed between them and him that the amount of compensation and purchase-money should be ascertained, not by a jury, but by ordinary arbitration. H. permitted the company to enter upon the land and begin their works there, pending the reference. An award was made, but the parties then disagreed as to the conveyance by which it was to be carried out, and H. brought ejectment :—*Held*, that he could not now treat the company as trespassers, but must seek his remedy against them under the award : *Doe d. Hudson v. Leeds and Bradford Ry.* (1851), 16 Q. B. 796.

(5) The G. N. Railway Co. in 1848 purchased of S. certain freehold land adjoining a turnpike road, to be used partly for the site of their railway and works and partly for the purpose of diverting a portion of an existing road. Having made a substituted road, the company, with the knowledge of S. and of the turnpike trustees, enclosed and took possession of the portion of the old road which had ceased, by the diversion, to form part of the turnpike road :—*Held*, that the absence of objection on the part of S. and his agents when the company took and continued in possession of the land in question, did not amount to

such a consent on his part as to preclude him from re-entering by virtue of sect. 124 : *Salisbury (Marquis) v. Great Northern Ry.* (1858), 5 C. B. N. S. 174.

(6) The defendant company, requiring certain land of the plaintiff, agreed to pay him 550*l.* out of the 900*l.* fixed as the amount of the purchase-money and took possession, but retained the balance until the vendor should make a good title :—*Held*, that the company had purchased the right of entering into possession, and should not under the circumstances be compelled to give up possession or to pay the balance into court : *Capps v. Norwich and Spalding Ry.* (1863), 9 Jur. (N.S.) 635.

(7) Declaration.—First count, under sect. 68 of the Lands Clauses Act, for the amount of compensation and costs ; second count, trespass to a dwelling-house and premises of the plaintiff ; fourth count, that the plaintiff was possessed of a dwelling-house adjoining a certain other house and was entitled to the support to his said dwelling-house of such other house, and that the defendants wrongfully deprived the plaintiff of the support of such other house by negligently pulling down the same. Plea to first count, that plaintiff was tenant from year to year only ; plea to second count, that the defendants took possession of the said house with the consent of the owner and occupiers under the Lands Clauses Act, 1845 ; plea to fourth count, except as to so much as charged negligence, that the premises were delineated on plans, &c., and that it was necessary to pull down the same for the purposes of the works, whereby the plaintiff's messuage fell down :—*Held*, on demurrer, that these pleas were good : *Knapp v. London, Chatham and Dover Ry.* (1863), 11 W. R. 890.

(8) The W. Railway took land and made a deposit, the value of the land was subsequently ascertained as being greater than the deposit. The court enforced the unpaid vendor's lien by sale, although the railway had been made over the land and opened for public use : *Walker v. Ware, Hadham and Buntingford Ry.* (1865), L. R. 1 Eq. 195.

(9) A. agreed to sell land to a railway company, and it was stipulated that they should be let into possession and pay the purchase-money in two years. The company took possession but had only paid one-third of the purchase-money. A. claimed specific performance and payment of the balance unpaid of the purchase-money. Before answer A. moved for payment of the balance of the purchase-money into court or delivery up of the land. Kindersley, V.-C., made an order for payment or delivery up of the land within one month ; if the land was delivered up, A. was, within a fortnight thereafter, to pay into court the amount of the purchase-money received by him : *Cooper v. London, Chatham and Dover Ry.* (1866), 14 W. R. 935.

(10) The owner of land permitted a railway company, to whom he had agreed to sell certain land, to go into possession. The company made their railway over the land so taken, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond :—*Held*, that the landowner was not entitled to an injunction to restrain the company from remaining in possession, but possibly to a receiver : *Pell v. Northampton and Banbury Junction Ry.* (1866), L. R. 2 Ch. 100.

(11) A railway having taken possession of land without the consent of the landowner, an agreement was come to for a certain sum payable on a certain day. The money was not paid, and the railway was completed and was in operation. The landowner filed a bill for specific performance and moved for payment on a fixed day or delivery up of the land :—*Held*, that a railway was exactly in the same position as an individual, and the money must be paid within six months or the land delivered up : *Sutton v. Hoylake Ry.* (1869), 20 L. T. 214.

(c) If, after taking possession, damage has been done to the property by the acts of the company, they must pay the purchase-money into court without being allowed the option of giving up possession.

Illustration.

A railway company agreed with the ground landlords (the plaintiffs) for the purchase of freehold house property, which was held by lessees. After the execution of the agreement, but without paying the deposit-money, the company went into possession of the property and turned the weekly tenants, who occupied it, out of possession. Some strangers afterwards made a forcible entry, pulled down some of the houses, and took away the materials:—*Held*, that the damage so done having been the result of acts of the company, the latter must pay the purchase-money into court without being allowed the option of giving up possession : *Pope v. Great Eastern Ry.* (1866), L. R. 3 Eq. 171.

(f) The owner of property required by a company does not lose his right to have the value assessed by a jury under sect. 23 because he has made no claim and because the company have proceeded under sect. 85. If they have not actually paid or tendered the money, the owner may proceed under sect. 23 or sect. 68.

Illustration.

A lessee mortgaged his interest in the premises to a building society and covenanted to assign to them. A railway company gave him notice to treat, and shortly afterwards he became bankrupt. The trustees of the building society then gave the company notice of their interest. By the aid of the Court the company obtained an assignment and took possession. The mortgagor made no claim for compensation before the company took possession :—*Held*, that he had not thereby lost his right to have the compensation (if any) due to him assessed by a jury : *R. v. Metropolitan Ry.* (1865), 13 L. T. 444.

(g) Specific performance (*see* sect. 6).

(h) Lien of unpaid vendor when possession has been taken under sect. 85 (*see* sect. 6, *ante*, sub-division IX., p. 65).

VI. Title of owner.

Entry under the provisions of sect. 85 on paying deposit does not empower the promoters to require the owner to produce his title.

Illustration.

Where a railway company takes a landowner's land under their compulsory powers and makes no subsequent agreement with him, but pays into court a deposit as security for duly ascertained compensation money, the parties are not in the position of ordinary vendor and purchaser, and the company cannot call upon the landowner to produce his title for their investigation : *Martin v. London, Chatham and Dover Ry.* (1868), 17 L. T. 487. "If the service of the notice results in the parties entering into a regular treaty, the vendor can, as usual, be compellable to show a title; but where no treaty follows, and

where the company, after having paid the purchase-money into court, proceeds to take possession of the property, they cannot ask for a production of an abstract of title": *per* Stuart, V.-C., at p. 488, *ib.*

86. The Money so to be deposited as last afore-said shall be paid into the Bank in the Name and with the Privy of the Accountant General of the Court of Chancery *in England or the Court of Exchequer in Ireland*, to be placed to his Account there to the Credit of the Parties interested in or entitled to sell and convey the Lands so to be entered upon, and who shall not have consented to such Entry, subject to the Control and Disposition of the said Court; and upon such Deposit being made, the Cashier of the Bank shall give to the Promoters of the Undertaking, or to the Party paying in such Money by their Direction, a Receipt for such Money, specifying therein for what Purpose and to whose Credit the same shall have been paid in.

Upon Deposit
being made
Cashier to give
Receipt.

[NOTE.—The words in italics are repealed by the Statute Law Revision Act, 1892.]

By virtue of sect. 4 of the Court of Chancery (Funds) Act, 1872, the Paymaster-General now performs all the duties and exercises all the powers and authorities formerly performed and exercised by the Accountant-General of the Court of Chancery. It is a compliance with the section if the money is paid into the bank in the name of the Paymaster-General, to the credit of *ex parte* the promoters, the account of the parties interested in the land or entitled to sell or convey; but if such parties are tenants in common a payment in to the account of both parties is irregular.

Illustrations.

(1) "The 86th section of the Act requires that the money to be deposited by way of security shall be paid into the bank, in the name and with the privy of the Accountant-General, to be placed to his account there, to the credit of the parties interested in or entitled to sell and convey the lands. And it appears from the cashier's receipt that the money in question has been so paid in, and that it has been placed to the account of the Accountant-General to the credit of 'Ex parte the Great Northern Railway Co.,' the account of the plaintiff. It seems to me that that is a compliance with the words of the Act; for the money stands to the account of the party interested in the lands, and, that being the case, the introduction of the words 'Ex parte the Great Northern Railway Co.' does not make wrong that which otherwise is right": *per* Shadwell, V.-C., in *Poynder v. Great Northern Ry.* (1847), 16 Sim. at pp. 18, 19.

(2) A railway company requiring land belonging to A. and B. as tenants in common took possession under the provisions of sect. 85 of the Lands Clauses Act and paid the ascertained value to the account of the said A. and B.:—*Held*, that payment in this form to persons who were tenants in common, although represented by one solicitor and acting together, was irregular: *Langham v. Great Northern Ry.* (1847), 5 Rail. Cas. 263.

Deposit to remain
as a Security, and
to be applied
under the Direc-
tion of the Court.

87. The Money so deposited as last aforesaid shall remain in the Bank, by way of Security to the Parties whose Lands shall so have been entered upon for the Performance of the Condition of the Bond to be given by the Promoters of the Undertaking, as hereinbefore mentioned, and the same may, on the Application by Petition of the Promoters of the Undertaking, be ordered to be invested in Bank Annuities or Government Securities, and accumulated; and upon the Condition of such Bond being fully performed it shall be lawful for the Court of Chancery *in England or the Court of Exchequer in Ireland*, upon a like Application, to order the Money so deposited, or the Funds in which the same shall have been invested, together with the Accumulation thereof, to be repaid or transferred to the Promoters of the Undertaking, or if such Condition shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such Manner as it shall think fit for the Benefit of the Parties for whose Security the same shall so have been deposited.

[NOTE.—The words in italics are repealed by the Statute Law Revision Act, 1892.]

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I. If the parties depart from the procedure prescribed by the Act and the money is deposited in a bank other than the Bank of England, it may be found to have been accepted as payment, and not as security.

Illustration.

A landowner agreed to sell land to a railway company, who, requiring immediate possession of it, offered to deposit the purchase-money in a certain bank in the joint names of the vendor and the chairman of the company, pending the investigation of the title. The vendor assented to the deposit being made, but in a different bank, and stipulated also that he should be paid 5 per cent. interest from the time possession was given. The deposit was accordingly made and possession taken by the company. Before the conveyance was completed, the bankers with whom the money was lodged became bankrupt, and most of it was lost :—*Held*, that the loss must be borne by the vendor, the deposit having been made and accepted as payment and not merely as security : *St. Paul v. Birmingham, Wolverhampton and Stour Valley Ry.* (1853), 11 Hare, 305.

II. Application of money paid in under sect. 86.

(a) The owner need not be served with the petition of the promoters for investment and accumulation.

Illustration.

A railway company, requiring immediate possession of certain lands, paid the ascertained value into court, and afterwards asked that the money so deposited might be invested in consolidated bank annuities, and the dividends which would thence accrue accumulated. The order had been made, but the registrar declined to draw it up, on the ground that the landowner ought to have been served :—*Held*, that such service was unnecessary : *Ex parte Carmarthen and Cardigan Ry.* (1863), 2 N. R. 515.

(b) Where the condition of the bond is satisfied, the money deposited must be paid out to the promoters without regard to questions of costs.

Illustrations.

(1) A railway company requiring immediate possession of land belonging to S., and being unable to agree with her as to the price, proceeded under sect. 85 of the Lands Clauses Act and took possession. The purchase having been completed and the purchase-money paid, the company presented a petition for payment out of court of the sum deposited. S. opposed, on the ground that she had been put to certain costs by the purchase, which had been disallowed on taxation :—*Held*, that the money must be paid out to the company, the costs incurred by the owner not being made a charge upon the fund in court : *Ex parte Stevens* (1848), 2 Ph. 772.

(2) A railway company having fully performed the condition of a bond which they had given under sect. 85 of the Lands Clauses Act, presented a petition under sect. 87 for the repayment of the amount deposited in the bank. The owner of the land taken contended that he was entitled to have, out of the money so deposited, his costs of the proceedings before a jury to ascertain the amount of compensation, and the costs of the investigation of his title and of the conveyance made by him :—*Held*, that these costs were otherwise provided for, and that the company was entitled to have the whole amount repaid : *Ex parte Great Northern Ry., In re Langham* (1848), 16 Sim. 169.

(3) In another case a similar order was made, an affidavit being, however, required to show that the costs due to the owner under the Act had been paid : *Ex parte Windsor, Staines and South-Western Ry., In re Pollock* (1849), 13 Jur 760.

(4) A railway company requiring certain land belonging to B., gave him their bond for the estimated value of the land, deposited the amount so estimated, and took possession. The value of the land was afterwards ascertained, and the vendor sued for the sum ascertained, with interest. The company then presented a petition praying payment out of court of the money deposited, but the vendor opposed on the ground that certain disallowed costs were still unpaid:—*Held*, that the company were entitled to have the sum repaid, and the vendor was not allowed any costs of the petition: *Ex parte Wimbledon and Dorking Railway Act* (1863), 9 L. T. 703.

(5) See also Illustration of *Ex parte Birmingham, Wolverhampton and Dudley Ry.*, (1863), 1 H. & M. 772, *post*, p. 593.

(6) "Money deposited under the 85th section is deposited for a particular purpose, and, when that purpose has been answered, the Legislature says, in so many words, that it is to be paid out to the company . . . 'It shall be lawful' means, in substance, that it shall not be lawful to do otherwise": *per* James, L.J., in *In re Neath and Brecon Ry.* (1874), L. R. 9 Ch. at p. 264. "I am not satisfied that any of these costs come within sect. 80, but supposing they do, that section only says that it shall be lawful for the Court to order them to be paid, and I do not think we ought to construe that as meaning that the Court may direct them to be paid out of any particular funds, for particular funds are generally deposited for particular purposes. I think the clause means only that the Court may make an order upon the company to pay them": *per* Mellish, L.J., at p. 265, *ib.*

(c) Promoters who have satisfied the conditions of the bond and to whom it has been delivered up, are entitled to have the money deposited paid out to them, upon a petition by themselves and the obligee of the bond, and they are not bound to prove that the purchase-money has been paid to the parties really entitled to it.

Illustration.

A railway company gave notice to treat to B., who claimed to be entitled as trustee to sell and convey certain land, and being desirous of entering on the land, made a deposit under sects. 85 and 86, and also gave a bond to B. the condition of which was that if the company should pay to B. or deposit in the Bank of England for the benefit of those interested the amount of the purchase-money and interest, the bond was to be void. The purchase-money was paid, and B. and the beneficiaries executed a conveyance to the company, whereupon B. delivered up the bond to the company. The company and B. then petitioned for payment out of the sum deposited. The petition was not served on anyone:—*Held*, that the company were entitled to have the sum paid out to them without showing that the purchase-money had been paid to the persons really entitled to it: *Ex parte Midland Ry.*, [1904] 1 Ch. 61.

(d) If the condition of the bond is fulfilled, a mortgagee has no lien on the money deposited.

Illustration.

M. was equitable mortgagee of leaseholds. The L. Railway Co. required the land and served notice to treat on S., M.'s mortgagor, and paid money in and gave a bond to S. and a bond to M. in the usual form, and took possession under sect. 85. An inquiry took

place between S. and the company, and the purchase-money was assessed at less than the amount of this mortgage, which was less than the money paid in. M. filed a bill against the company and S., and obtained an injunction restraining the company from proceeding, which was dissolved on the terms that the money in court should be transferred to a new account of S. and M :—*Held*—(1) that M. had no lien on the money in court ; (2) that M. was not affected by the Lands Clauses Act, but that he was entitled to the ordinary relief of an equitable mortgagee, *i.e.*, an account of what was due for principal and interest, and in the event of non-payment, an assignment by the company, and if necessary by S. of the leasehold interest : *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501.

(e) If the promoters execute a bond under sect. 85, but do not enter, and afterwards, with the consent of the owner, abandon the purchase, they are entitled to a return of the deposit and to have the bond cancelled.

Illustration.

On August 1st, 1851, the B. Railway Co. paid into court a deposit of 2,860*l.*, and gave a bond to the S. Railway Co. in respect of land belonging to the latter company and required by the B. Company. The land was never taken, and the B. Company, with the concurrence of the S. Company, abandoned their intention to take the land, and had obtained powers to make a substituted line. In 1861 a bill had been filed by the S. Company to restrain the B. Company from taking possession, and a motion for an injunction was ordered to stand over. A petition having been presented for a retransfer of the deposit, and for cancellation of the bond :—*Held*, that the S. Company was not entitled to have the costs of the suit out of the deposit, for in this case the intended purchase had been abandoned and the condition of the bond left unperformed with the full concurrence of the owners, and that therefore the B. Company was entitled to have the deposit retransferred and the bond cancelled : *Ex parte Birmingham, Wolverhampton and Dudley Ry.* (1863), 1 H. & M. 772.

(f) If after compensation is assessed the owner refuses to execute the conveyance, he cannot prevent the payment out of the deposit to the promoters.

Illustration.

Where the sum awarded as compensation for land taken proved to be much smaller than that claimed, and the owner refused to execute a conveyance :—*Held*, upon a petition by the company (possession having been taken under sect. 85) for payment out to them of the sum paid in before taking possession of the land, that the landowner was not entitled to avail himself of the security provided by the Act in the deposit of the money and at the same time to repudiate the proceeding, the benefit of which it was the object of the Act thus to secure to him, and that the company were entitled to have the money paid out to them : *In re Wilts, Somerset and Weymouth Ry. Act, In re Fooks* (1849), 2 Mac. & G. 357.

(g) The petition by the promoters for payment out must be served upon the persons whose names are mentioned in the account, unless these persons join in the petition or consent.

Illustrations.

(1) A company requiring immediate possession of land, paid money into court and executed a bond under sect. 85 of the Lands Clauses Act. The conveyance by the owner

was duly carried out and the purchase-money paid. The company then presented a petition for repayment of the money in court. The petition was not served upon the owner, but an affidavit was produced showing that all the costs due to the owner under the Act had been paid. The Court made an order for payment of the money to the company : *In re Eastern Counties Ry.* (1848), 5 Rail. Cas. 210.

(2) A railway company paid the estimated value of land into court under sect. 85, and afterwards concluded the purchase by contract. Thereupon the company petitioned for payment out of the sum deposited by them : —*Held* that, although there was an affidavit that the purchase-money and costs had been paid, an order ought not to be made without serving the vendor with the petition or making him a co-petitioner : *In re South Wales Ry.* (1850), 6 Rail. Cas. 151.

(3) Where upon a petition for payment out of a deposit the consent in writing of the vendor to the prayer of the petition had been obtained : —*Held*, that this was enough : *Ex parte Huddersfield Corporation, In re Dyson* (1882), 46 L. T. 730.

4) A railway company petitioned for payment out of money which had been deposited. The petition was served only on the official solicitor : *Held* that, although a long period had elapsed since the payment in, the petition must be served upon the persons whose names were mentioned in the account : *Ex parte London and North-Western Ry.* [1887] W. N. 128.

NOTE.—In the two following cases, where a long period had elapsed since the deposit, service on the official solicitor alone was held sufficient. It is to be observed, however that the first of these two cases was cited in *Ex parte London and North-Western Ry.* (*supra*), where also a long period had elapsed, and not followed ; while in *Ex parte Midland Ry.* (*infra*) the decision in *Ex parte London and North-Western Ry.* (*supra*) appears not to have been called to the attention of the Court. The same judge (North, J.) decided all three cases.

Illustrations to Note.

(1) In 1867 a railway company, requiring immediate possession of land, paid the estimated value into court and took possession. The land was afterwards conveyed, but no application made for repayment of the money in court until 1884, when a petition was presented and served only upon the official solicitor : —*Held*, that the proper course had been taken, and that the money might be paid out, the costs of the official solicitor coming out of the fund : *Ex parte Lancashire and Yorkshire Ry.* (1886), 55 L. T. 58.

(2) Where the payment to the landowner of the purchase and compensation money was evidenced by a receipt given him, and a number of years had elapsed since the payment : —*Held*, that the railway company were entitled to have the money deposited under sect. 85 paid out without service of the petition being required to be made on the landowners or their representatives : *Ex parte Midland Ry.* [1894] W. N. 38.

(*li*) If the petition is not complicated thereby, the application for the payment out of several sums paid in under sect. 86 may be made in one petition.

Illustrations.

(1) A railway company requiring lands which were in the possession of M., T., H. and Y., the matter of compensation was referred to an arbitrator, and the several sums awarded

were duly paid into court to the separate credits of M., T., H. and Y. Agreements were afterwards come to between these persons and the company for the purchase of their interest, and the sums agreed upon were paid by the company. One petition was then presented by the company for the repayment of the several sums in court :—*Held*, that an order might be made on one petition for the return of the four sums : *In re Downpatrick, Dundrum and Newcastle Ry.* (1870), Ir. R. 4 Eq. 497.

(2) A railway company requiring lands belonging to five different persons, and proceeding under sect. 85 of the Lands Clauses Act, five sums were duly paid into court by the company. The compensation due to each person was afterwards ascertained and paid. One petition was presented by the company asking for the return of the five deposits, and an order made thereon as asked : *Ex parte Midland Ry.* [1894] W. N. 38.

(k) The costs of appearance of a person served with the petition will only be allowed where his appearance is really necessary.

Illustrations.

(1) When the circumstances of the case are exceptional—as, *e.g.*, when it is not clear that the vendor has been paid all that is due to him, and the condition of the bond fulfilled—the Court will allow him the costs of appearing to consent on a petition for payment out under sect. 85 of the Lands Clauses Act : *In re Tottenham and Hampstead Junction Ry.*, (1866), 14 W. R. 669.

(2) A municipal corporation took lands under statutory powers, and paid money into court under sect. 85 of the Lands Clauses Act. The conveyance having been executed and the purchase-money paid, the corporation presented a petition for return of the deposit. Application was made to the vendors' solicitors to allow the names of the vendors to be added as co-petitioners, but this was refused, and they were therefore made respondents, and the petition was duly served upon them. At the hearing the vendors appeared to consent, and asked for the costs of their appearance, upon the authority of *Ex parte Stevens* (2 Ph. 772), *ante*, p. 591 :—*Held*, that they were not entitled to any costs, their appearance being unnecessary : *In re Holman's Settlement* [1877] W. N. 272.

NOTE.—On the subject of costs generally, *see* sect. 80, *ante*.

(l) Production of the bond by the promoters is sufficient evidence that the conditions thereof have been satisfied.

Illustration.

Where a railway company took possession of land belonging to L. and gave him a bond for the amount of the valuation of the land :—*Held*, upon petition for payment out of the sum deposited (L.'s representative not opposing), that the production of the bond was sufficient evidence that the conditions thereof had been satisfied, and the money was ordered to be paid out without further evidence of title : *In re London and North-Western Ry.* (1872), 26 L. T. 687.

(m) The payment out to the secretary of the promoting company may be ordered upon the petition being stamped with the seal of the company.

Illustration.

The L. Railway Co. had paid money into court under sect. 85 :—*Held*, that it could be paid to the secretary of the company if the petition was sealed with the company's

seal, and it was not necessary to verify the seal by affidavit: *Ex parte London, Chatham and Dover Ry.* (1860), 8 W. R. 636.

III. Failure to perform the condition.

(a) Where the condition of the bond is not satisfied, the Court has jurisdiction on the application of the vendor to order the payment out of the deposit to him. The Court has a similar jurisdiction in actions for specific performance.

Illustrations.

(1) "The case would be very different if the condition of the bond had been broken by reason of pecuniary inability on the part of the petitioning company. In such a case the Court would take care that the fund should not be parted with until all costs occasioned by the notice were provided for: otherwise a company would always be at liberty to seize land against the will of the owner, and then say we cannot purchase the land; we are unable to fulfil the condition of the bond, and we will apply to the Court and obtain the return of our deposit. But it is very different where the intended purchase is abandoned and the condition of the bond left unperformed (as it is here) with the full concurrence of the landowner": *per* Wood, V.-C., in *Ex parte Birmingham, Wolverhampton, and Dudley Ry.* (1863), 1 H. & M. at p. 774.

(2) A railway company took possession, under sect. 85 of the Lands Clauses Act, of certain land and paid the estimated value thereof into court. Other land was afterwards taken and further sums paid into court in respect thereof. The owner filed a bill for specific performance of the agreement for sale which had been made between himself and the company, and the money in court, with interest, was, with the consent of the company, paid out to the owner of the land: *Walker v. Ware, Hadham, and Buntingford Ry.* (1865), L. R. 1 Eq. 195.

(3) A railway company, being desirous of taking possession of land belonging to M., and being unable to agree upon the price, had the land valued, paid the amount so ascertained into the bank, executed a bond under sect. 85, and took possession. A sum amounting to 139*l.* more than that deposited was afterwards awarded to M. as purchase-money and compensation. The company having neglected to complete the purchase, M. presented a petition asking that the deposit might be paid out to him in part payment of the compensation, and for his costs, he undertaking to convey upon payment of the deposit and the balance of 139*l.*, with interest on the purchase-money:—*Held*, that the Court had power to order the money to be paid out in the event of non-performance of the condition of the bond: *In re Mutlow's Estate* (1878), 10 Ch. D. 131.

(b) Where the condition of the bond is not satisfied the landowner is the proper person to make the application, not the promoters.

Illustration.

"The argument on behalf of the company is that this Act having thus provided a security for the landowner by ordering the money to be deposited, that security is to be entirely nugatory and useless unless the company itself applies for payment out of the deposit to the landowner. If that is so, then the security would undoubtedly be useless, because in the only case in which the landowner would want the money, that is, in the event of the company's insolvency, he could not get it without waiting for the company to enforce the security against itself. I should be very indisposed to put such a construction upon the Act if it was fairly open to any other. It seems to me that as the deposit stands as a security for the landowner's benefit in case the company is unable to

pay, he is the proper party to make the application ; and, on reading the section, the 87th, I think that is the right construction" : *per* Jessel, M.R., in *In re Mutlow's Estate*, *ante*.

88. If at any Time the Company be unable, by reason of the closing of the Office of the Accountant General of the Court of Chancery *in England or the Court of Exchequer in Ireland*, to obtain his Authority in respect of the Payment of any Sum of Money so authorized to be deposited in the Bank by way of Security as aforesaid, it shall be lawful for the Company to pay into the Bank, to the credit of such Party or Matter as the Case may require (subject nevertheless to being dealt with as hereinafter provided, and not otherwise), such Sum of Money as the Promoters of the Undertaking shall, by some Writing signed by their Secretary or Solicitors for the time being, addressed to *the Governor and Company of the Bank* in that behalf, request, and upon any such payment being made the Cashier of the Bank shall give a Certificate thereof ; and in every such Case, within Ten Days after the reopening of the said Accountant General's Office, the Solicitor for the Promoters of the Undertaking shall there bespeak the Direction for the Payment of such Sum into the Name of the Accountant General, and upon production of such Direction at the Bank of England the money so previously paid in shall be placed to the Credit of the said Accountant General accordingly, and the receipt for the said Payment be given to the Party making the same in the usual Way for the Purpose of being filed at the Report Office.

NOTE.—The first words in italics are repealed by the Statute Law Revision Act, 1892 ; and the second words by the Statute Law Revision Act, 1891.

Penalty on the Promoters of the Undertaking entering upon Lands without consent before payment of the Purchase Money.

89. If the Promoters of the Undertaking or any of their Contractors shall, except as aforesaid, wilfully enter upon and take possession of any Lands which shall be required to be purchased or permanently used for the Purposes of the Special Act, without such Consent as aforesaid, or without having made such Payment for the Benefit of

the Parties interested in the Lands, or such Deposit by way of Security as aforesaid, the Promoters of the Undertaking shall forfeit to the Party in possession of such Lands the sum of Ten Pounds, over and above the Amount of any Damage done to such Lands by reason of such Entry and taking Possession as aforesaid, such Penalty and Damage respectively to be recovered before two Justices; and if the Promoters of the Undertaking or their Contractors shall, after conviction in such Penalty as aforesaid, continue in unlawful Possession of any such Lands, the Promoters of the Undertaking shall be liable to forfeit the Sum of Twenty-five Pounds for every day they or their Contractors shall so remain in possession as aforesaid, such Penalty to be recoverable by the Party in possession of such Lands, with Costs, by Action in any of the Superior Courts: Provided always, that nothing herein contained shall be held to subject the Promoters of the Undertaking to the Payment of any such Penalties as aforesaid, if they shall *bonâ fide* and without Collusion have paid the Compensation agreed or awarded to be paid in respect of the said Lands to any Person whom the Promoters of the Undertaking may have reasonably believed to be entitled thereto, or shall have deposited the same in the Bank for the Benefit of the Parties interested in the Lands, or made such Deposit by way of Security in respect thereof as hereinbefore mentioned, although such Person may not have been legally entitled thereto.

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I. To come within this section the original entry must be wilful—that is to say, there must be an absence of honest belief on the part of the company that the conditions precedent had been satisfied.

Illustration.

A railway company being desirous of entering upon land before an agreement had been come to for compensation pursuant to sect. 85 of the Lands Clauses Act, proceeded under sect. 59 to have a surveyor nominated for determining such compensation. One of the

justices who nominated him was a shareholder in the company, but this fact was unknown at the time to the company, and the company thereupon took possession of the land :—*Held*, that this was not a “wilful” entry within the meaning of sect. 89 : *Steele v. Midland Ry.* (1869), 21 L. T. 387. “I am clearly of opinion that the term ‘wilfully,’ as used in the 89th section, means an absence of an honest belief on the part of the company of the existence of the conditions precedent. When they entered upon the land it must be supposed, from all the circumstances, that they believed they had a right to do so. They were certainly at that time in ignorance that one of the justices who signed the authority to the surveyor was a shareholder ; and although they continued in possession after they became acquainted with that fact, that does not make their original entry wilful” : *per* Cockburn, C.J., at p. 392, *ib.*

II. If the promoters bonâ fide take possession after payment into court of the compensation awarded, the fact that they have not performed certain conditions precedent to their right so to deposit it will not bring them within the section.

Illustration.

A company *bonâ fide* and without collusion took possession of lands in respect of which compensation had been awarded by a jury under the Act, after they had deposited the amount thereof in court to the credit of the plaintiff, the person in possession, but without having performed certain conditions precedent to their right so to deposit it, and retained such possession after notice :—*Held*, that they were protected by the proviso from liability to the penalty of 25*l.* a day ; also that the word “wilfully” applied only to the first part of the clause : *Hutchinson v. Manchester, Bury and Rossendale Ry.* (1846), 15 M. & W. 314.

III. The penalties mentioned in the section are given only to the occupier, but the Court has jurisdiction to grant an injunction at the suit of an owner who is not in occupation.

Illustration.

“It was then insisted by the company that the 89th section provides a penalty in case they entered upon lands without having complied with the enactments already mentioned [sects. 18 and 85 of the Lands Clauses Act]. It might be sufficient to say that the penalties therein mentioned are only given to the occupier, and that therefore the section is not applicable to the present case. But even if the section did apply to the owner, who was not in occupation, I cannot assent to the proposition that the right to recover a penalty ousts the jurisdiction of this Court to grant an injunction : *Coats v. Clarence Ry.* (1830), 1 Russ. & M. 184 ; 32 R. R. 183. I am very unwilling to delay the works or prejudice the company, but I must protect the rights of owners of land, and the injunction must go, unless the company undertake to lodge in the bank the sum claimed and give the bond required by the 85th section and pay the costs of this motion” : *per* Cusack Smith, M.R., in *Armstrong v. Waterford and Limerick Ry.* (1846), 10 Ir. Eq. R. at p. 64.

90. On the Trial of any Action for any such Penalty as aforesaid the Decision of the Justices under the Provisions herein-before contained shall not be held conclusive as to the Right of Entry on any such Land by the Promoters of the Undertaking.

Decision of Justices
not conclusive as to
the Right of the
Promoters.

Proceedings in case
of Refusal to deliver
Possession of Lands.

91. If in any Case in which according to the Provisions of this or the Special Act, or any Act incorporated therewith, the Promoters of the Undertaking are authorised to enter upon and take possession of any Lands required for the Purposes of the Undertaking, the Owner or Occupier of any such Lands or any other Person refuse to give up the Possession thereof, or hinder the Promoters of the Undertaking from entering upon or taking possession of the same, it shall be lawful for the Promoters of the Undertaking to issue their Warrant, to the Sheriff to deliver Possession of the same to the Person appointed in such Warrant to receive the same, and upon the Receipt of such Warrant the Sheriff shall deliver Possession of any such Lands accordingly, and the Costs accruing by reason of the issuing and Execution of such Warrant, to be settled by the Sheriff, shall be paid by the Person refusing to give Possession, and the Amount of such Costs shall be deducted and retained by the Promoters of the Undertaking from the Compensation, if any, then payable by them to such Party, or if no such Compensation be payable to such Party, or if the same be less than the Amount of such Costs, then such Costs, or the Excess thereof beyond such Compensation, if not paid on Demand, shall be levied by Distress, and upon Application to any Justice for that Purpose he shall issue his Warrant accordingly.

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I. The words "it shall be lawful" are permissive only, and impose no obligation on the promoters.

Illustrations.

(1) "The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. . . . And the words 'it shall be lawful' being, according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this

power to show in the circumstances of the case something which, according to the principles I have mentioned, creates the obligation": *per* Earl Cairns, C., in *Julius v. Oxford (Bishop)* (1880), 5 App. Cas. at p. 222.

(2) "But then it is said that the defendants' entry was void for this reason, that the plaintiff had, before they entered, notified to them that he should refuse to allow their entry, which it is quite plain that he did on the 5th of July, and it is said that when the landowner refuses to allow the company to enter, they can enter only through the intervention of the sheriff. For that purpose reference was made to the 91st section of the Lands Clauses Act. It is said that that authority carries with it an obligation, and that the company could not enter, except with the assistance of the sheriff. Now, in the first place, the words of the section are very plain, 'it shall be lawful,' and it has been determined, in *Julius v. Oxford (Bishop)* (*ante*), after great discussion by the House of Lords, that the words, 'it shall be lawful' in a statute mean 'it shall be lawful,' and nothing more, unless there is something in the context or the circumstances of the case which turns words of permission into words of obligation. In the next place, it is impossible to read the words in sect. 91 as words of obligation, because, if the landowner refuses to permit the entry, the company are at liberty not to enter: they are not under any obligation to summon the sheriff. In my judgment, therefore, the words create an obligation to set the sheriff in motion only where it would be unlawful to enter without his intervention, that is, where the entry would be forcible if the company acted upon their right of entry": *per* Fry, J., in *Loosemore v. Tiverton and North Devon Ry.* (1882), 22 Ch. D. at p. 41; affirmed in the House of Lords (1884), 9 App. Cas. 480.

II. Where there is a wilful refusal on the part of the owner to receive the purchase-money or give possession, the expense incurred by the promoters in obtaining possession will be ordered to be paid by him.

Illustrations.

(1) Land being required by a railway company, notice to treat was given and the question of compensation referred to arbitration. The title was afterwards approved and the conveyance settled. The vendor's solicitors sent in their bill of costs to the company, but the company objected to the amount, and, requiring immediate possession, tendered the amount of the purchase and compensation money. The vendor refused to receive it unless his solicitors' costs were paid. The company then called upon the sheriff to give possession:—*Held* that, there having been a wilful refusal to receive the purchase-money the vendor was not entitled to his costs, and that the costs of getting possession through the sheriff must be paid by him: *In re Turner's Estate* (1862), 5 L. T. 524.

(2) Certain land belonging to S. was taken by the L. County Council, who paid the purchase-money into court and executed a deed poll under sect. 77 vesting the property in themselves. They afterwards required S. to give up possession, and as he neglected to do so they issued a warrant under sect. 91 to the sheriff to deliver possession, which he did. The sheriff's costs amounted to 19*l.* 7*s.* 6*d.*, and the council claimed to have this amount paid to them out of the fund in court:—*Held*, that they were entitled to be paid this sum out of the fund in court: *In re Schmarr*, [1902] 1 Ch. 326 at p. 331.

92. And be it enacted, That no Party shall
 Parties not to be required to sell at any time be required to sell or convey
 Part of a House. to the Promoters of the Undertaking a Part
 only of any House or other Building or Manufactory, if such

Party be willing and able to sell and convey the whole thereof.

NOTE.—The section ought to be construed “reasonably and fairly, having regard, of course, to previous decisions; and having regard to this, that the object and intention of this section was evidently to give a certain protection to landowners . . . so that no person should be required to sell a fraction only of that which ought to be regarded as a unit”: *per* Chitty, J., in *Brook v. Manchester, Sheffield and Lincolnshire Ry.*, [1895] 2 Ch. at p. 575.

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I. Parties "able to sell and convey."

(a) Persons under disability who can sell and convey under sects. 6 and 7 (*ante*) are "able to sell and convey" within the meaning of sect. 92.

Illustrations.

(1) Trustees of charity lands were *held* entitled to an injunction restraining a railway company from taking a part of a house without taking the remainder : *Grosvenor v. Hampstead Junction Ry.* (1857), 1 De G. & J. 446.

NOTE.—In this case no point was taken that the applicants, being trustees of a charity, were not "able to sell and convey." The point was, however, raised in *St. Thomas's Hospital v. Charing Cross Ry.*, *infra*.

(2) The governors of St. Thomas's Hospital were *held* entitled to an injunction restraining the defendant company from taking a portion only of one wing of the hospital without taking the whole of the hospital, the governors being parties able to sell and convey the whole within the meaning of sect. 92 : *St. Thomas's Hospital v. Charing Cross Ry.* (1861), 1 J. & H. 400.

(b) Sect. 92 applies although the landowner may have only a leasehold interest.

Illustration.

In an action by the lessee of a house and field which lay near the house, requiring the defendant company to take the whole of the field as being part of the house within sect. 92 it was objected that the plaintiff could not sell the entire interest in the land as he was only entitled to a term, but the Court *held* that a termor was entitled to the benefit of the section, although his option would not affect the owner of the fee : *Pulling v. London, Chatham and Dover Ry.* (1864), 3 De. G. J. & S. at p. 667.¹

NOTE (1).—Whether a yearly tenant is a party "able to sell and convey" does not appear to have been decided. It is submitted, however, that he is. But difficulties may arise on either view, where a person is in possession of premises, *e.g.*, a manufactory partly under a yearly tenancy and partly under a lease for years.

NOTE (2).—Under Michael Angelo Taylor's Act promoters are not entitled to insist upon taking the whole when they only require part of a building, although where they give notice to take a part the owner may compel them to take the whole.

Illustrations to Note (2).

(1) The K. Vestry served notice to treat on T., the trustee of an orphanage, in respect of the orphanage premises of about half an acre for the purpose of widening a street under statutory powers. The vestry had adjudicated that the whole was necessary for the widening. Part only would actually be required for the widening, and a substantial part would be left. T. wished to sell only the part actually required :—*Held*, that the vestry could not compel T. to sell the whole : *Teuliere v. St. Mary Abbots (Vestry)*, (1885) 30 Ch. D. 642.

(2) A local authority requiring part of a house for the purpose of widening a street under Michael Angelo Taylor's Act, gave notice to treat for the whole house :—*Held*, that they could not do this against the wishes of the owner, unless they proved that the remainder was useless to him ; and that that was so even if the removal of the part actually required would destroy the identity of the house, as a house, to such an extent that the owner might have compelled them to take the whole if they had given notice to treat for part only : *per Kekewich J.*, in *Aldis v. London Corporation*, [1899] 2 Ch. 169.

II. Meaning of "any house."

(a) Legal meaning.

To the word "house" in this section has been given not its common meaning, which embraces a building simply, but its larger legal meaning; so that by the term is meant all that will pass in an ordinary conveyance of the house. It includes adjacent buildings, curtilage, courtyard, garden and orchard, and all that is necessary for the convenient occupation of the house, but not that which is only for the personal use and convenience of the occupier.

In *Low v. Staines Reservoir Joint Committee* (1900), 16 T. L. R. 184, the Master of the Rolls quoted the following passage from Sheppard's Touchstone (p. 94):—"By the grant of a messuage or a messuage with appurtenances doth pass no more than the dwelling-house, barn, dove-house and buildings adjoining, orchard, garden, and curtilage—i.e., a little garden, yard, field, or piece of void ground lying near and belonging to the messuage, and houses adjoining to the dwelling-house and the close upon which the dwelling-house is built, at the most (viz., whatever is annexed to and enjoyed with the house, for its more convenient occupation), and so much also may pass by the grant of a house."

Curtilage.

Illustrations.

(1) The trustees of the P. almshouses bought land and covenanted to erect a central building within a fixed time and to erect wings when their funds should allow. Before the trustees began to build, the H. Railway Co. served notice on the trustees of their intention to apply to Parliament for powers to construct a railway. The trustees built the central building. The company obtained powers and served notice to treat for part of the land, and the plans showed that the line was intended to pass close to the existing building and over the site on which one of the wings would be erected. The trustees gave the company notice to take the whole or none of their land. The company gave notice to take the part required compulsorily:—*Held*, that the word 'house' in sect. 92 must be read in its ordinary and legal sense, and that the company could not compel the trustees to sell part: *Grosvenor v. Hampstead Junction Ry.* (1857), 26 L. J. Ch. 731.

(2) "Land held with a house does not necessarily pass under the word "house" even although it was intended to pass; but if it is part of the curtilage and within the circuit of the house, if it is necessary to the enjoyment of the house, if it forms part of that which is necessarily held and occupied with the house, and without which it cannot be enjoyed, then it does pass under the word 'house.' But this is subject to some qualification, as it could not mean that everything within the circuit of a park wall which extended for a mile and upwards would pass": *per Romilly, M.R.*, in *King v. Wycombe Ry.* (1860), 29 L. J. Ch. at p. 465.

Garden.

Illustrations.

(1) Some twenty-five or thirty years before action the governors of a hospital had purchased additional land on part of which a new wing was built, the rest being laid out as a garden.

A railway proposed to take a portion of this garden, the centre line of the railway being only twenty-three feet from the new wing. There was a provision in the special Act that when the viaduct for the railway was made across the garden of St. Thomas's Hospital it should be made and maintained by means of girders resting upon cast-iron pillars:—*Held*, that the railway must take the whole hospital: *St. Thomas's Hospital v. Charing Cross Ry.* (1861), 1 J. & H. 400.

(2) C. owned a piece of ground, whereon were built three houses, each with a separate garden. Each house was occupied by a separate tenant. A company which desired to take a portion of two of the gardens was *held* to be bound to take the two houses to which those gardens belonged, and to compensate C. for injury sustained in respect of the third house. The company could not, however, be required to take the third house: *Cole v. West London and Crystal Palace Ry.* (1859), 27 Beav. 242.

Gardens and shrubbery.

Illustration.

A house was surrounded by a shrubbery and a series of gardens, all divided by walls, but connected by a gravel path passing through doors in the walls. A railway company gave notice to treat for the purchase only of the garden most remote from the house:—*Held*, that the company must take the whole of the premises: *Hewson v. London and South-Western Ry.* (1860), 2 L. T. 369.

Garden and orchard.

Illustration.

A company proposed to take a large part of the orchard and a corner of the garden, within the curtilage of F. House, the effect of which would have been to cut off the ordinary communication between the dwelling-house and stables. As to an adjacent smaller house, the company proposed to take only a small portion of the garden. The owner gave a notice requiring the company to take the whole:—*Held*, that the company were bound to take the whole of the F. House, with the stables, garden and orchard, but as to the smaller property the company had a right to say to the owner, who had not been in the least disturbed, "Our notice is to take only a piece; we decline taking the whole; we abandon the little piece": *King v. Wycombe Ry.* (1860), 28 Beav. 104.

House and part of garden under two leases.

Illustration.

M. held under one demise a house and part of a garden: the remainder of the garden he held under another demise. A railway company required part of the property. Wood, V.-C., without deciding the point, expressed an opinion that the company were bound to take the whole: *MacGregor v. Metropolitan Ry.* (1866), 14 L. T. 354.

A freehold house and leasehold cottages.

Illustration.

Richards v. Swansea Improvement and Tramways Co. (post, p. 609).

Two buildings under separate leases.

Illustration.

Siegenberg v. Metropolitan Ry. (1883), 49 L. T. 554 (*see illustration, post, p. 609*).

Land held for pleasure only, and not of necessity for the enjoyment of the house.

Illustration.

F. was the lessee of a house and garden situated on one side of a road, and also of a strip of land on the other side of it. The lessees of the adjoining houses had also each a strip on the far side of the road. The leases of all contained covenants against building on such strips of land, and the lessees by arrangement threw them all into one plot, which they used for purposes of recreation. A railway company required this strip of land. F. insisted that if they took his portion of the strip they must also take his house and garden :—*Held*, that the strip of land being held for pleasure only, and not of necessity for the enjoyment and occupation of F.'s residence, it would not have passed by a conveyance of the house simply, and that therefore the company by taking it could not be compelled to take the rest of his property : *Fergusson v. London, Brighton and South Coast Ry.* (1863), 33 Beav. 103.

Land held for personal use of owner and occupier.

Illustration.

S. was owner and occupier of a house on the west side of the Edgware Road. There were six acres of meadow attached to the house, and finding these insufficient for the use of the cows and horses which he kept for the benefit of his family, he bought a further six and a quarter acres on the east side of the road, the nearest point being 120 yards from his entrance gate. At the nearest point of this land was a cow-house, loose-box and cottage for the use of his grooms, as there was no accommodation for the latter on the other side of the road. S. had occupied the land as stated for a number of years. A railway company served him with a notice that they required to purchase a part of the six and a quarter acres, and S. served upon the company a counter-notice requiring them to take the whole of his "house" :—*Held*, that the six and a quarter acres could not be considered part of the house within the meaning of sect. 92 : *Steele v. Midland Ry.* (1866), L. R. 1 Ch. 275.

NOTE.—The word 'house' in the above section includes all that would pass by a devise of a house, but that does not include land which is not necessary for the convenient use and occupation of the house, but only for the personal use of the owner and occupier. *Ib.*

Unfenced land in front of a public-house.

Illustration.

M. was tenant of a public-house which was bounded on one side by a street and in front by a piece of vacant land not fenced off from the street, and separated from the house only by a narrow strip of pavement, also without fence, which was ordinarily used by the public as a thoroughfare, though sometimes closed. The piece of land had for forty years been treated as passing to the lessee by every demise; it was used by customers of the public-house, and it furnished the only means of approach for vehicles to the front door.

A railway company gave notice to M. to treat for a small portion of the vacant piece of land ; M. sent them a counter-notice requiring the company to take all the property comprised in the lease, including the public-house :—*Held*, that the piece of land came within the definition of a curtilage, and was part of the house within the meaning of sect. 92 : *Marson v. London, Chatham and Dover Ry.* (1868), L. R. 6 Eq. 101.

Nursery and ornamental gardens.

Illustration.

S. was a nurseryman and florist residing in a nursery ground two and one-eighth acres in extent and surrounded by a brick wall. The land was occupied by greenhouses, a fernery, and by a warehouse with servants' rooms in the upper storey. Adjoining the warehouse was S.'s residence with a greenhouse attached. In front of this greenhouse was a lawn and kitchen garden. The rest of the ground was used as a nursery garden, laid out with paths and beds, and with ornamental trees and fruit trees growing in different places. A railway company wished to take some of the greenhouses and a part of the land planted and used for ornamental purposes :—*Held*, that S. was entitled to compel the company to take the whole of the premises : *Salter v. Metropolitan District Ry.* (1870), L. R. 9 Eq. 432.

Market gardens.

Illustration.

A piece of land, two and a half acres, surrounded by a ring fence, had for many years been used as a market garden. Twenty-five years before action, a cottage was erected near a road forming part of the boundary of the land for the purpose of being occupied by the tenant of the garden ; in front of the cottage were ornamental flower beds, which, however, did not take the whole space between it and the road. A railway company drove a tunnel which passed under a corner of the cottage and divided the land into two portions, one of which was less than half an acre :—*Held*, that the land was a field and not a garden, and that the company could only be compelled to take the cottage and the piece of land between it and the road and the land lying above the tunnel ; and also, if the owner desired it, the severed portion which was less than half an acre : *Falkner v. Somerset and Dorset Ry.* (1873), L. R. 16 Eq. 458.

Paddock.

Illustrations.

(1) B. bought a piece of land, on part of which he built a house and laid out a garden, surrounding them with a high wall. The rest of the property he retained as a pasture paddock, enclosed on one side by the wall and on the other three sides by high ornamental hedges. A private road, used as the back entrance to the premises, passed through the paddock. A railway company sought to take the portion of the paddock and private road farthest from the house :—*Held*, that the whole of the property formed one house : *Barnes v. Southsea Ry.* (1884), L. R. 27 Ch. D. 536.

(2) The plaintiff was the lessee for a term of a house and land known as Hawthorn Lodge, in the parish of Sunbury. The property comprised a little more than two acres and consisted, in addition to the house, of a garden and a paddock of more than an acre. There was no separate access to the paddock. The yearly tenant used the paddock for keeping fowls and growing fruit, carrying on the business of a poulterer and greengrocer. The defendants gave the plaintiff notice to treat for a small triangular piece of the paddock containing one rood and twenty-four perches :—*Held*, that the paddock was part of the house, on the ground that a grant of the house would include the paddock : *Low v. Staines Reservoirs Joint Committee* (1900), 16 L. T. R. 184.

Fields adjacent to gardens.

Illustration.

Fields adjacent to the gardens of a house, sometimes used for pleasure, but as a rule for pasturing cows, although connected by gravelled paths with the gardens, and having a coachman's house in one corner, were *held* not to be part of the "house" within the meaning of sect. 92 : *Pulling v. London, Chatham and Dover Ry.* (1864), 33 L. J. Ch. 505.

Land separated by road.

Illustration.

K. in the year 1853 purchased a piece of land lying on the north side of a road, and on it he built a residence for himself. As there was practically no land attached to the house, in 1864 K. purchased some land on the south side of the road and built on it stables, a coach-house, two cottages, peach-houses, and a conservatory, and laid out the remainder as a kitchen garden. The stables were connected with his house by a pneumatic tube under the road, and all the buildings were occupied together as part of his residence. A railway company desired to take the land on the south side of the road. K. required them to take his residence on the north side too :—*Held*, that the property on the south side of the road would not pass under a devise of the house, and that consequently the company could not be compelled to take the residence : *Kerford v. Seacombe, Hoyalake and Deeside Ry.* (1888), 57 L. J. Ch. 270.

Adjoining lands and private road.

Illustration.

A mansion-house, grounds, and private road formed part of the T. estate. In 1890 the devisees of the late owner conveyed to the plaintiff (*inter alia*) the mansion-house, grounds, and site of the private road, reserving a right of way over such road. The private road, 620 yards in length, led from an inner lodge adjoining the house to a public highway, on which was situated an outer lodge. The defendants served plaintiff with notice to treat for a portion of the private road required for the construction of a bridge. The plaintiff gave notice that he required the defendants to purchase the whole of the house under sect. 92 of the Lands Clauses Act :—*Held*, that as a conveyance of the mansion would not without more have passed either the adjoining lands or the soil of the private road, the portion of the road did not form part of plaintiff's "house" within the meaning of sect. 92 : *Allhusen v. Ealing and South Harrow Ry.* (1898), 46 W. R. 388, 483.

Station buildings.

Illustration.

By a special Act the defendants were given powers to purchase property compulsorily subject to tithes if they indemnified the owner of the tithes by purchasing them under the Lands Clauses Act, 1845. On the question whether certain property described as Aldgate Station, occupied by the defendants, was or was not liable to tithes, Field, J., thought it clear on looking at the defendants' special Act, that the tithability did not cover that area, but must be "limited to that which was either a house, warehouse, shop, or something of that kind." *Per* Cave, J. : "By a house I understand something which is an enclosed space with walls, a roof, and an entrance capable of being closed. It is quite clear that that will not include the lines and platforms . . . because they have no entrance capable of being closed" : *Esdaile v. Metropolitan and District Rys.* (1881), 46 J. P. 103.

Arches under a road used as cellars.

Illustration.

T. was owner of a shipbuilding yard, which included arches under an adjacent road, which were used as storerooms. The S. Gas Co., under an Act incorporating the Gas Works Clauses Act, laid down gas pipes in the road, and in so doing cut into the brickwork of the arches :—*Held*, that the arches were buildings within sect. 7 of the Gas-works Clauses Act, and therefore that the company were trespassers : *Thompson v. Sunderland Gas Co.* (1877), 2 Ex. D. 429.

(b) User may determine what is a "house" within the meaning of the section.

Illustrations.

(1) By a railway Act the company was not to be compellable to purchase any portion of any dwelling-house, &c., which was situate at a greater distance than fifty feet from the railway, but that the company, whenever called upon to take a part of such dwelling-house, might, at their option, take the whole. By another section, if any person should be required by the company to sell part of a house, &c., in his actual occupation, and should offer to treat with them for the whole and they should refuse, such person was not to be compellable to sell less than the whole. The company were required to purchase a public-house, forty-four feet in depth, the greater part of which was within fifty feet of a railway, but a portion, comprising the bar, and varying in depth from thirteen to sixteen feet, was more than fifty feet from the railway ; and it was alleged that the premises were deteriorated by the railway, and that, if the former portion only was purchased, the residue would be useless to the owner :—*Held*, that compensation was claimable for the whole : *Walker v. London and Blackwall Ry.* (1842), 3 Q. B. 744.

(2) R. was lessee of a house in H. Street, and also held five freehold cottages in B. Row, which was parallel to H. Street. One of the cottages (No. 5) was used as a storeroom, and communicated with the back yard of the house, and was used as a back door to R.'s premises. R. used the house as a dwelling-house and shop, and buildings behind it and also the yard as a candle manufactory :—*Held*, that the cottage No. 5 was part of the house by reason of the internal communication and the circumscribed ambit : *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. 425. "The question whether premises are a house or not is partly structural—they must be so made or placed that they may in a large sense be one house—and partly one of user, that is, they must be held or enjoyed as one house." "A wide interpretation has been put upon the word 'house' ; it does not mean necessarily a mere dwelling-house, or a house used only, or exclusively or principally, for a residence : the word 'house' would include a very large inn or anything of that kind which was built for one purpose" : *per* Brett, L.J., at p. 435, and James, L.J., at p. 431, *ib.*

NOTE.—The "purpose" above referred to is the purpose of the owner. He may use part for residence, part for manufacture and part as a shop.

(3) M. carried on business at a shop in W. Road, adjoining which in the rear were a warehouse, showroom, stable-yard, and gateway into B. Row. The warehouse, &c., were also used for the purposes of his business, and there was communication between them and the shop. The shop and warehouse were held of the same landlord under two separate leases of even date :—*Held*, that a railway company, who sought to take the warehouse and stables only, were bound to take the whole of the premises : *Siegenberg v. Metropolitan District Ry.* (1883), 49 L. T. 554.

(4) H. occupied Nos. 108 and 109, Whitechapel Road as a wholesale provision merchant, the two houses having internal communication and being occupied, with stables, &c., at the back. The M. Railway Co. gave H. notice to take the back part of the premises only. H. served a counter-notice requiring the whole property to be taken, and, upon the company refusing, sought an injunction to restrain the part to which the notice related being taken. Upon motion for such injunction, the company's counsel undertook (after an intimation of opinion from the Court) not to issue the warrant for the part without the whole, unless the estimated value of the whole property was deposited: *Hunt v. Metropolitan Ry.*, Times, February 19th, 1884.

NOTE.—Though the consideration of user is important, since it may enlarge the meaning of the word “house” and cause it to include perhaps two or more houses as one, yet if a building is structurally a house it does not seem that user for purposes other than the ordinary uses of a house will make it cease to be a house; thus it may not be used at all, or may be used solely for storage purposes, and still not cease to be a house within the meaning of the section.

(c) “Any house” means one house, and the promoters cannot be compelled to take two or more houses only because they are structurally, not completely, severed from one another. [Note, however, the effect of user, *ante*.]

Semi-detached villas.

Illustration.

H. was the lessee of two semi-detached villas under one continuous roof. The party wall between them was only carried up to the ceilings of the bedrooms, so that the space between those ceilings and the roof formed one continuous space, but with this exception there was no internal communication between the two villas. If one of the villas were to be pulled down it would be necessary either to pull down the other villa or to shore it up and complete and carry up the party wall to the ridge of the roof. Each villa had its own garden and yard:—*Held*, that a railway company could take one villa without the other: *Harrie v. South Devon Ry.* (1874), 32 L. T. 1.

House and manufactory.

Illustration.

R. v. London and Greenwich Ry. (1842), 3 Rail. Cas. 138 (*see* Illustration, *post*, p. 627).

(d) It is not necessary that a house in course of erection should be completed at the time of notice to treat in order that the promoters may be compelled to take the whole, which includes land lying in front intended for a garden.

Illustration.

Alexander v. West End and Crystal Palace Ry. (1862), 30 Beav. 556 (*see* Illustration, *post*, p. 615).

III. Meaning of “other building.”

The word building does not interpret the word “house” so as to confine it to the actual edifice or structure, but extends the provisions of

the section to other erections which might not fall within the word "house."

Illustrations.

(1) "The argument, on the part of the railway company, as I understand it, is this: that in the descriptive words 'part only of any house or other building or manufactory,' the word 'building' interprets the word 'house' so as to confine the latter word to the actual edifice or structure of a house. I cannot, however, agree in that construction; on the contrary, I think that the word 'building' in this section was inserted for the purpose of extending the provision of the section to erections which might not fall within the description of the word 'house,' to buildings not being houses": *per* Turner, L.J., in *Grosvenor v. Hampstead Junction Ry.* (1857), 1 De G. & J. at p. 453.

(2) "Now, there are three words used: 'part only of any house or other building or manufactory.' In my opinion these must be considered as three things, that is to say, there may be a manufactory which is not a building, there may be a building which could not properly be described as a house, and a house includes more than mere building, and I am of opinion that although a house or other building is read together in this sense, that a house involves the notion of building, yet that a manufactory does not involve necessarily the idea of building. Manufactory is put there, in my opinion, to provide for the case of a manufactory being carried on on premises where there was no house or building, but yet it is a manufactory in the sense of its being premises appropriate for the carrying on of what may be called a manufacture, and is a manufactory in that sense. Then 'building' and 'house' I also look upon as distinct in this way, that there may be a building which could not be said, either in the legal sense or in the ordinary sense, to be a house, and that therefore that word was added as something different from that in order to include something not necessarily included in this word 'house': *per* Cotton, L.J., in *Richards v. Swansea Improvement and Tramways Co.* (1878), 9 Ch. D. at p. 437.

NOTE.—But although this larger meaning has been assigned to the words "other building," yet it is conceived that not everything that can be called a building is comprehended. Thus a wall surrounding an estate is a building, but no attempt has been made to bring such an erection within the section, and were it made it is unlikely that the Courts would permit it to succeed. In *Richards v. Swansea Improvement, &c., Co.* (*supra*) Brett, L.J., at p. 434, said that "each thing described is different from the others, and it is not circumscribed by the description of any of the others." But although this is so, yet it is submitted that the word "building" must be confined to something in the nature of a house to this extent, that it must consist of walls and be roofed in. In support of this view it must be noticed that the words of the section are "any house or other building," and not "any house or building," which suggests that the word "house" is to be looked upon, to a certain extent at least, as indicating the nature of the building. But although premises are brought within sect. 92, if it is established that they form one or other of the three things mentioned, a "house or other building or manufactory," yet it may be most important in some cases to show that the premises consist of a "house" rather than that they are an "other building or manufactory." A house includes not only the structure itself, but also the curtilage, garden, outbuildings, and such like, while a building consists probably of the building and its immediate adjuncts only. Therefore if the premises were held to be a "house," that might embrace much more than if they were an "other building or manufactory." For example, a brick building in an orchard would, if it were a "house," probably include the orchard as well, but if it were held to be an "other building," the orchard, it is conceived, could not be held to be part of it. In the former case the promoters requiring part of the building could be compelled to take the whole building and the orchard; in the latter case they could be compelled to take the whole building but not the orchard.

IV. Meaning of "manufactory."

(a) Generally.

Illustrations.

(1) A manufactory must be premises used for some manufacture : *Reddin v. Metropolitan Board of Works* (1862), 31 L. J. Ch. 660.

(2) A manufactory "may be a house, or may be a building, but . . . may be something more; that is to say, it may be more than one house, or more than one building, or it may consist of neither house nor building, but only of land used for the purpose of manufacturing" : *per Brett, L.J.*, in *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. at p. 434.

(3) It may consist of a building part of which is not used at the time as a manufactory. "It would not be necessary that every part of what would be reasonably called a manufactory should actually be in use at the time for the purpose of manufacture; for instance, there might be a large manufactory and some part of it, say a large room, might not be required for the purpose of the business. Still, as it was all within the walls, although it was not then in use for the purpose of the business, the rest of the building being sufficient, in my opinion, that makes no difference as to that part being part of the manufactory" : *per Chitty, J.*, in *Brook v. Manchester, Sheffield and Lincolnshire Ry.*, [1895] 2 Ch. 571.

(b) Particular cases.

Land used for the deposit of ashes from a manufactory.

Illustration.

A railway company sought to acquire certain land enclosed in the same wall with certain tinplate works, and used for the deposit of ashes from the manufactory. A road, over which a stranger had a right of way, separated the land from the remainder of the manufactory :—*Held*, that the company could be compelled to take the whole manufactory : *Sparrow v. Oxford, Worcester and Wolverhampton Ry.* (1852), 2 De G. M. & G. 94.

Premises used for different manufactures.

Illustration.

See Illustration of *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. 425, *ante*, p. 609.

Part of a manufactory separated by a road.

Illustration.

S. was the owner of a manufactory which stood on one side of a road, upon the other side of which were some cottages used as storehouses in connection with the manufactory, and being in fact the only warehouses possessed by the manufactory. There was also, with the cottages, a dwelling-house belonging to S. A railway company gave notice to S. of their intention to take the dwelling-house and some of the cottages :—*Held*, that the cottages were part of the manufactory and the company could be compelled to take the whole manufactory : *Spackman v. Great Western Ry.* (1855), 1 Jur. (N.S.) 790.

Water-power for working manufactory.

Illustration.

A firm of manufacturers whose machinery was sometimes worked by water-power had a reservoir which was supplied by a goit into which water was turned out of a natural river some distance off. At the point where the goit commenced there was a weir in the river. There were shuttles for regulating the flow of water into the goit and a mill-house for the occupation of a man whose duty it was to attend to the shuttles. A railway company gave notice to treat for part of the premises, including the weir, shuttles, mill-house and part of the bed of the river and of the goit. They proposed to pass over the portions they wished to take by bridges:—*Held*, that the goit, weir, &c., were parts of the manufactory, and that they must take the whole: *Furniss v. Midland Ry.* (1868), L. R. 6 Eq. 473.

Part of a house which is part of a manufactory.

Illustration.

A firm of manufacturers were the lessees of certain land and buildings and manufacturing premises situate between C. Street and W. Street, Nottingham, which land and premises were numbered 1 to 8 on plan. The building numbered 3 on plan was a three-storey brick building, the ground floor of which was underlet by the plaintiffs, while the first and second floors were divided in about the middle by a temporary wooden partition, the northern portion of which floors was occupied by one S. as a tenant at will of the plaintiffs, and the southern portion was occupied by the plaintiffs for the purpose of their business. In April, 1895, the defendants gave notice to take about one-fifth part of the land and premises, including the northern portion of No. 3, in the occupation of S., and also a portion of the yard around which the whole of the premises had been built:—*Held*, that the part which the defendant required to take was part of a manufactory: *Brook v. Manchester, Sheffield and Lincolnshire Ry.*, [1895] 2 Ch. 571.

(c) "Manufacture" means producing something new from raw materials.

Dust contractor's premises.

Illustration.

R. was a contractor for the removal of dust, and had extensive premises to which the dust was taken and sorted. There were also on the premises stampers for pulverising crockery into sand to be used in brickmaking and appliances for the manufacture of manure. The tot-shop in which the refuse, other than that pulverised or made into manure, was sorted was required by the M. Board of Works. R. thereupon claimed to be entitled to compel them to take the whole of the premises used by him in his business:—*Held*, that the collection of dust was not a manufacturing process, and that the tot-shop, being incident to the business of a dustman, was not incident to any manufacturing process or to the manufactory within the meaning of sect. 92: *Reddin v. Metropolitan Board of Works* (1862), 4 De G. F. & J. 532.

Tea merchants' premises.

Illustration.

B. & Sons, tea merchants, carried on their business at P. House and also in houses in G. Street hard by. In the G. Street houses the tea was stored, blended and milled, and by

those and similar processes special teas of a distinct quality were produced and sold in the market under B. & Sons' trade-mark. In P. House the packing requisites were prepared and made and the tea packed, and thence it was delivered to buyers. The M. Board of Works sought to take P. House under their powers :—*Held*, that “manufacture” meant producing something new from raw material, which was not the case here ; but that, even if a manufacture was carried on at G. Street, there was no manufacture carried on at P. House, and as the business and manufacture were carried on upon distinct premises, it was not incumbent on the Board to take the whole property : *Benington v. Metropolitan Board of Works* (1886), 54 L. T. 837.

Yard for bonding foreign timber.

Illustration.

S. was the proprietor and occupier of a timber-yard which was used for bonding foreign timber and was surrounded and enclosed ; within the yard were sheds and two buildings containing sawpits. Defendants gave notice of their intention to take a part of the yard for the purposes of their Act. The special Act gave protection similar to that given by sect. 92 of the Lands Clauses Act to any “house, garden, yard, warehouse, building or manufactory.” S. required the defendants to take the whole of his yard :—*Held*, that the words “yard” and “garden” must be read in connection with the word “house” ; that the timber-yard was not part of a warehouse or manufactory ; and that the railway company were entitled to take the part only : *Stone v. Commercial Ry.* (1839), 9 Sim. 621 ; 48 R. R. 32.

(d) Fixtures annexed to a manufactory, including trade and other fixtures such as a tenant could remove during his tenancy, form part of the manufactory.

Illustration.

G. was the owner of an iron manufactory, and received a notice from a railway company to treat for a portion of the land and premises. He gave a notice requiring the company to take the whole of the manufactory under sect. 92. The manufactory was valued on behalf of the company, but without taking into account certain fixtures, such as engines and machinery, on the premises. The company contended that, the fixtures being trade fixtures removable by the owner, G. could not compel the company to take them :—*Held* that, although the fixtures were trade fixtures which the lessee might remove during the term, yet they formed part of the manufactory and the company was bound to take them : *Gibson v. Hammersmith and City Ry.* (1863), 2 Dr. & Sm. 603.

V. Time when premises are to be considered as “house,” &c.

(a) The words “part only of any house,” &c., mean part of any house, &c., in existence at the date of the notice to treat.

Illustrations.

(1) “I consider that the Act of Parliament must be construed according to the state of things existing at the time when the notice to treat was given” : *per* Hall, V.-C., in *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. at p. 428.

(2) After a notice to treat had been given with regard to a piece of land, the owner built a house thereon, so that the land became, in fact, the curtilage to it :—*Held*, that the

owner could not, under sect. 92, compel the company to take the house as well as the land, the house not having been on the land at the date of the notice to treat : *Littler v. Rhyl Improvement Commissioners* [1878] W. N. 219.

(b) An owner cannot compel the promoters to take land as part of a house on the ground that the landlord had promised a lease before notice to treat and had granted it afterwards.

Illustration.

A. was lessee of a house and garden and was promised by his intermediate landlord that, on the determination of B.'s occupancy of an adjoining house, he would procure him (A.) a lease of a meadow at the back of the garden connected by a gravel walk running round and only separated by iron hurdles. In the meantime A. and B. jointly occupied the meadow. A railway company required a corner of the meadow and were allowed to take possession without prejudice to a claim by A. to compel them to purchase his whole house and premises. After possession taken by the company B. died and A. obtained a lease of the meadow :—*Held* that, A. having only a contingent right to the meadow when the notice to treat was served, it did not at that time form part of the house within sect. 92, and that A. could not therefore compel the company to purchase the whole of his house and premises : *Chambers v. London, Chatham and Dover Ry.* (1863), 8 L. T. 235.

NOTE.—In a case where a dispute arose as to the right of the lessee to renewal of the lease, and after notice to treat the company purchased the lessor's reversion in fee, the Court *held* that they had jurisdiction to decide the right of the lessee to renewal : *Bogg v. Midland Ry.* (1867), L. R. 4 Eq. 310.

(c) It is not necessary that the house (or other building or manufactory) should be complete at the time of notice to treat provided that so much has then been done that an honest intention to have completed it but for the notice to treat is manifest. And if this intention is manifest the building may after the notice be discontinued.

Illustration.

A. owned a piece of land which was laid out for building in 1849, and three houses were built on it and covered in, but not completed. In 1855 a railway company gave notice of their intention to take a part of the land which was intended for a garden or forecourt to each of the three houses, and A. in consequence omitted to finish the houses or lay out the gardens, and served upon the company a counter-notice requiring them to take the whole of the buildings :—*Held*, that he was entitled to compel the company to do so : *Alexander v. West End and Crystal Palace Ry.* (1862), 30 Beav. 556.

VI. Exclusion of the section.

(a) Expressly.

If the special Act expressly excludes sect. 92 it will not be operative.

See the similar provisions in the Housing of the Working Classes Act, 1890, Sched. II. 3 (12).

(i.) "Material detriment" clause.

If the special Act provides that the promoters may take part only of premises, if in the opinion of an arbitrator or jury such part can be severed from the whole without material detriment, the question whether such severance does cause material detriment can be raised by the owner giving to the promoters a counter-notice in the same manner as if the above clause were not contained in the special Act. The counter-notice given, an issue will be tried, before the arbitrator or jury, whether the part can be severed without material detriment. If it can, the final issue will be tried to decide the compensation to be paid for the part. If it cannot, the promoters will be in the same position as if the special Act did not contain the clause empowering them to take a part, and they can abandon their notice to treat, or they may assent to the counter-notice, and a further issue will be tried to decide the compensation to be paid for the whole. There is no provision in the Lands Clauses Act, 1845, for payment of the owner's costs of an inquiry as to material detriment before a jury, and therefore, in the event of the jury deciding that the part can be sold without material detriment, the owner is left to pay his own costs, unless, of course, he has protected himself by obtaining the insertion of a provision in the special Act. If such inquiry, however, should be before an arbitrator it would seem that he would have power under the Arbitration Act, 1889, to award costs.

Illustrations.

(1) A railway company's special Act contained a clause providing that notwithstanding sect. 92 of the Lands Clauses Act, the company might take a portion of the lands, buildings, and manufactories in the schedule without being compelled to take the whole, "if such portions can, in the judgment of the jury, arbitrators, or other authority assessing or determining the compensation under that Act, be severed from such properties without material detriment thereto." The company gave the plaintiffs the usual notice to treat for a portion of the premises occupied by them as a confectionery manufactory. The plaintiffs gave a counter-notice requiring the company to take the whole. The company issued a warrant to the sheriff to summon a jury to determine the amount of compensation to be paid by them for the portion comprised in their original notice. The plaintiffs gave the company notice that they should raise the question whether that portion could be severed without material detriment to the property, and dispute having arisen whether in this state of things the company would be bound to take the whole if the jury decided against them on the question of severance, the plaintiffs brought an action and moved for an injunction to restrain the company from proceeding further on their warrant unless and until they should have consented to take the whole of the property if the jury decided the portion could not be severed without material detriment:—*Held*, that the company could not be deprived of their right, if the jury decided against them, to abandon their notice to treat altogether, but that the warrant should have raised two issues—(1) whether the portion could be severed without serious detriment to the property; (2) if so, the amount of compensation to be paid by the company, including damages for severance: *Morrison (or Wood) v. Great Eastern Ry.* (1885), 53 L. T. 384.

(2) Sects. 80 and 82 of 57 Geo. III. c. xxix. give the local authority power to purchase and take compulsorily part only of a house or building where the facts establish that such taking will not involve a substantial alteration of the character and condition thereof, so that it can no longer be occupied as the kind of building it was before, or that such taking will not sensibly and substantially interfere with the convenience of the occupier or render it necessary to make structural alterations in order to carry on a different kind of business, or one of a more limited nature than that carried on before: *per Curiam* in *Gordon v. St. Mary Abbots, Kensington (Vestry)*, [1894] 2 Q. B. 742. But, where the facts were that the removal of the part proposed to be taken would substantially injure the enjoyment of the house in the manner in which it was formerly enjoyed, it was *held* the local authority must take the whole building: *Gibbon v. Paddington Vestry*, [1900] 2 Ch. 794.

(ii.) Jurisdiction of jury, &c.

NOTE (1).—A form of warrant to the jury to decide the question of detriment will be found in the Appendix, as well as a clause protecting the owner against having to pay his own costs.

NOTE (2).—A jury or an arbitrator in determining whether there would be material detriment to the remainder of the property by taking a portion under a special clause as described in the above note is entitled to take into consideration all the circumstances of the case, including an undertaking to provide access to the remainder of the property severed.

Illustration to Note (2).

A railway company by their Act were empowered to take part of scheduled properties, if, in the opinion of the tribunal for assessing compensation, part could be taken without material detriment to the remainder. The company proposed to take part of certain property, and undertook before the arbitrator to provide access to the part not taken, which would otherwise be cut off from the public highway:—*Held*, that the arbitrator was entitled to take this undertaking into consideration, both in determining the question whether the part could be taken without material detriment to the remainder, and in assessing the compensation: *In re Gonty and Manchester, Sheffield and Lincolnshire Ry.*, [1896] 2 Q. B. 439.

NOTE.—In the case of the *Caledonian Ry. v. Turcan*, [1898] A. C. 256, the only decision was as to the finality of a Scottish award, though questions similar to those in *Gonty's Case* were raised but not decided.

(b) Impliedly.

- (i.) The provisions of sect. 92 cannot be excluded because the capital has not been subscribed under the provisions of sect. 16.

NOTE.—Sect. 16 only applies in the case of the compulsory taking of land, and as a notice to treat is not necessarily an exercise of the powers of the Act “in relation to the compulsory taking of land” (*Guest v. Poole and Bourne-mouth Ry.* (1870), L. R. 5 C. P. 553); it would follow that a counter-notice, which Lord Cranworth in *Pinchin v. London and Blackwall Ry.* (1854), 24 L. J. Ch. 417, described as a substitution for the notice to treat, would equally not be an exercise of the powers of the Act “in relation to the compulsory taking of land.”

- (ii.) The right under sect. 92 is not impliedly excluded by the special Act unless it contains clauses entirely inconsistent

with the section. This is the case when a power to take part of a house, &c., is expressly given, but clauses regulating the working of the railway or its mode of construction, although inserted to meet the opposition of the owners, are not so broadly inconsistent as to exclude the operation of the section.

Clause regulating speed of trains and amount of whistling.

Illustration.

The special Act of a railway company contained clauses restricting the speed of the trains and the amount of whistling. They sought to take part of a hospital, the governors of which required them to take the whole:—*Held*, that the restrictive clauses did not exclude the operation of sect. 92: *St. Thomas's Hospital v. Charing Cross Ry.* (1861), 30 L. J. Ch. 395.

NOTE.—If the promoters had purchased the whole they would have been released from the clause if they could have made out that it was solely in reference to the hospital that the clause was inserted: *per* Wood, V.-C., at p. 401, *ib.*

- (iii.) The promoters have no power under the Lands Clauses Act to compel the owner to sell an easement over or under his land, unless they have express power given by the special Act.

Tunnelling.

Illustrations.

(1) A railway company gave notice to treat as to part of a manufactory, and an action was brought to restrain the company from taking part without the whole:—*Held*, that they could not at the hearing argue that they could avoid taking a part by tunnelling under the manufactory, and that (probably) such tunnelling would be taking a part: *Sparrow v. Oxford, Worcester and Wolverhampton Ry.* (1852), 2 De G. M. & G. 94.

(2) *Falkner v. Somerset and Dorset Ry.* (1873), L. R. 16 Eq. 458 (*see* Illustration, *ante*, p. 607).

Arching over part of a manufactory to afford communication with the severed portion.

Illustration.

The special Act of a railway company incorporated so much of the Lands Clauses Act as was not inconsistent with the special Act. A clause of the special Act provided that such parts of the line as passed through a piece of land should be arched over so as to afford to the owner a communication between the severed portions:—*Held*, that this was not inconsistent with sect. 92, and did not enable the company to take their line through part of a manufactory without buying the whole: *Sparrow v. Oxford, Worcester and Wolverhampton Ry.*, *supra*.

Bridges.

Illustrations.

(1) *Pinchin v. London and Blackwall Ry.* (1854), 5 De G. M. & G. 85, *post*, p. 626.

(2) *Furniss v. Midland Ry.* (1868), L. R. 6 Eq. 473 (*see* Illustration, *ante*, p. 613).

Girders and cast-iron pillars across a garden.

Illustration.

St. Thomas's Hospital v. Charing Cross Ry. (1861), 30 L. J. Ch. 395 (see *Illustration, ante*, p. 605).

VII. Time for giving counter-notice.

(a) A counter-notice must be given within a reasonable time, and before the promoters take the premises under their compulsory powers.

Illustration.

The words "shall at any time be required" mean "shall at any time be compelled." The words "must mean that he shall not be compelled to convey. Then when does compulsion arise? It arises when you first begin to put your compulsory powers in motion . . . the landowner is not to be compelled to convey, and therefore may at any time up to compulsion assert his right not to convey unless he has precluded himself by a counter equity": *per* Wood, V.-C., in *Gardner v. Charing Cross Ry.* (1862), 2 J. & H. 248.

NOTE.—In practice the counter-notice should be given as early as possible after notice to treat. The counter-notice would probably be in time if given before the submission to arbitration under sect. 25, and before the issue of the warrant to summon a jury under sect. 39. See *Lavers v. London County Council* (1905), 21 T. L. R. 695.

(b) Delay in giving the counter-notice may deprive the owner of his rights under this section.

Illustrations.

(1) A company gave notice to treat for ten pieces of land, made deposits for, and entered into possession of, eight pieces of land. The owner claimed that they should take ten pieces, according to their notice. The owner did not raise any claim under sect. 92, though he knew he could. The question of the ten pieces was then decided in favour of the owner. The company then took the ten pieces and proceeded according to the Act, and then the owner set up a new case and claimed that the company should take the whole works, these ten pieces being part of a manufactory, and came to the Court to restrain the company by injunction from taking the part. The Court refused to grant an injunction: *Barker v. North Staffordshire Ry.* (1848), 12 Jur. 589. "A party having known his rights, and having had his claim in respect of them disposed of, if he then raises a new ground of equity does not present his case in a form to entitle him to ask for the extraordinary interposition of this Court. A party might thus bring out his case by portions instead of at once stating it; and to prevent this, and from a regard to the interest of suitors in this Court, I should think it right to refuse to grant an injunction to a party thus seeking it": *per* Lord Cottenham, L.C., at p. 590, *ib.*

(2) *Spackman v. Great Western Ry.* (1855), 1 Jur. (N.S.) 790 (see *Illustration, post*, p. 628).

(3) A railway company served a notice to treat upon G. and G. as joint tenants of a house. G. and G. sent in a claim in respect of the part to which the notice related; and, having declined to allow possession to be taken by the company, the latter proceeded under the provisions of sect. 85 of the Lands Clauses Act and took possession. G. and G.

then served a notice under sect. 92 requiring the company to take the whole :—*Held*, that G. and G. were not precluded by what had taken place from asserting their right under sect. 92 to require the whole property to be taken : *Gardner v. Charing Cross Ry.* (1861), 2 J. & H. 248.

(4) A railway company desiring to enter upon part of the lands belonging to P. and adjacent to his house, paid into court the value of the land as fixed by a surveyor, and executed a bond under sect. 85 of the Lands Clauses Act, and proceeded to make the railway. When the railway was complete and about to be opened, P. filed his bill submitting that the house and lands comprised in his lease constituted a “house” within the meaning of sect. 92, and asking for a declaration that the company was bound to purchase his interest in the whole of the property :—*Held*, that the land taken was not part of P.’s house ; and *quære* whether the bill ought not to have been dismissed on the ground of P.’s *laches* : *Pulling v. London, Chatham and Dover Ry.* (1864), 3 De G. J. & S. 661.

V II. Effect of counter-notice.

(a) It suspends the notice to treat.

The effect of a counter-notice is not to determine the incomplete relation of vendor and purchaser created by the notice to treat, but to suspend it and to place in its stead an option under which the promoters may either elect to take the whole of the premises or to take none. If the promoters elect to take none the notice to treat is absolutely determined, as there is no obligation upon them to take the whole when they only require to take a part. On the other hand, while the counter-notice is persisted in they are unable to take the part only.

Illustrations.

(1) A company gave notice to take a part of a manufactory, and the plaintiffs replied with a counter-notice requiring them to take the whole, and afterwards sought to obtain a *mandamus* to issue a precept for summoning a jury to assess compensation for the whole :—*Held*, that there was nothing in the Act that made it obligatory on the company, who wanted only a part, to take the whole (or after counter-notice to take the part) : *R. v. London and South-Western Ry.* (1848), 12 Q. B. 775.

(2) “It seems not only contrary to any equitable view of the rights of the parties, but plainly contrary to the actual provisions of the statute, to hold that the notice was determined by the counter-notice, but the real view is simply that it was suspended until it should be ascertained whether or not the railway company were willing to take the whole of the manufactory. According to the case of *R. v. London and South-Western Ry.* (*supra*), the company are not bound to accept the proposition made in the counter-notice, and during the suspension it is competent for the landowner either to insist upon the counter-notice or to withdraw it, in which latter case the original notice (to treat) would remain in force. To say that the original notice is gone is a confusion of terms, inasmuch as the condition on which the plaintiffs obtained the liberty of arresting the company’s right by the counter-notice was only that they were willing and able to sell the whole of the manufactory. The moment they cease to be willing to do this the obstacle is withdrawn, because it only existed upon those terms” : *per* Page Wood, V.-C., in *Pinchin v. London and Blackwall Ry.* (1854), 1 K. & J. at p. 66. “My present impression is, that when a notice has been given, if it be a good notice, and a counter-notice given, if it be a good counter-notice, that is a substitution of the counter-notice for the original notice, and that

there would be a jurisdiction on the part of the jury to proceed on the amalgamated notices so constituting one notice" : *per* Lord Cranworth, C., *ib.*

(b) The option which arises upon the service of a counter-notice is exercised either by the promoters assenting to the counter-notice, or by the promoters abandoning the notice to treat.

- (i.) If the promoters assent to the counter-notice, a fresh notice to treat is not necessary, and twenty-one days' notice under sect. 21 (*ante*) is not required before summoning a jury; but the promoters must give the owner a reasonable time to agree before doing so.

Illustration.

A railway company in June, 1853, served notice to treat upon S., stating that they required to take certain parts of his property. On July 11th S. gave the company a notice requiring them to take the whole of the property; on July 27th the company's powers expired. After some negotiation with respect to a purchase of the whole property, the company in September, 1854, gave S. notice under sect. 38 of their intention to summon a jury to assess the amount to be paid for the whole property. S. then filed his bill for an injunction to restrain the company from proceeding any further as to his property :—*Held*, that it was not incumbent upon the company to serve a fresh notice under sect. 18 to include the whole property; that the period of twenty-one days mentioned in sect. 21 of the Lands Clauses Act was not applicable to such a case; but that the company was bound to afford to S. an opportunity for treating before proceeding to have the whole settled by a jury : *Schwinge v. London and Blackwall Ry.* (1855), 24 L. J. Ch. 405.

- (ii.) Time for assent to counter-notice. The promoters upon receipt of a counter-notice are under no obligation to assent to it within any particular time or before the expiration of their compulsory powers; but they must do so before the expiration of the time limited for the completion of the works.

Illustration.

"No doubt, after the service of the counter-notice, there must be some step taken by the company which should amount to a signification by them of their intention to take the whole; but I cannot, upon the construction of the Act of Parliament or with reference to the decided cases, hold that the company are bound to signify their assent to take the whole before the expiration of the compulsory powers, and for this reason, that the notice to take a part might have been served on the last day of the duration of the compulsory powers" : *per* Stuart, V.-C., in *Schwinge v. London and Blackwall Ry.* (1855) 24 L. J. Ch. at p. 407,

- (iii.) Abandonment of notice to treat before counter-notice is assented to. Where promoters have given notice to treat and the owner has given a counter-notice, the promoters may

abandon their notice to treat at any time before they have assented to the counter-notice or before they have actually taken possession of any part of the property; but subject to the obligation of making good any damage they have caused by driving away tenants or otherwise.

Illustrations.

(1) "Now the 92nd section, though it protects the owners from being obliged to sell a part, does not contain any words making it obligatory upon the company, who only want a part, to take the whole, as some other Acts of Parliament do": per Denman, C.J., in *R. v. London and South-Western Ry.* (1848), 12 Q. B. at p. 785.

(2) The promoters gave notice to treat for part of premises; K. gave counter-notice requiring them to take the whole. The promoters built a dwarf wall at the extreme boundary of the premises, and did not take or intend to take the premises they had given notice to take or any part of them:—*Held*, that they were entitled to abandon the notice they had given subject to any damage or injury they might have caused, such as by driving away tenants: *King v. Wycombe Ry.* (1860), 29 L. J. Ch. 462.

(3) *Morrison v. Great Eastern Ry.* (1885), 53 L. T. 384 (*see* Illustration, *ante*, p. 617).

(4) On May 2nd, 1899, the defendants served notice to treat on the plaintiffs in respect of a wharf, landing-stage and part of a tramway belonging to them. On May 18th following the plaintiffs served a counter-notice under sect. 92 requiring the defendants to take the whole property, and on June 2nd served a further notice requiring compensation for the whole property to be assessed by arbitrators. The defendants then served the plaintiffs with a notice requesting them to appoint an arbitrator on their part to assess compensation for the part of the property described in the notice of May 2nd. The defendants on December 12th, 1899, served notice withdrawing the notice of May 2nd, and on December 16th served a fresh notice to treat for the same property. On March 5th, 1900, the defendants withdrew the notice of December 16th and gave a fresh notice, excluding part of the premises. The plaintiffs again served a counter-notice requiring the whole to be taken. Upon an application to restrain all proceedings under the notice of March 5th:—*Held*, that the defendants' powers were not exhausted by the first notice, and that, this having been validly withdrawn, they were at liberty to give a fresh notice and to proceed to the assessment of compensation upon the latest notice not withdrawn: *Ashton Vale Iron Co. v. Bristol Corporation*, [1901] 1 Ch. 591.

- (iv.) What constitutes assent. A notice of intention by the promoters to apply to the Board of Trade for the appointment of a surveyor to value the premises comprised in their notice to treat is not an assent to a counter-notice served on them or a contract by them to take the whole.

Illustration.

On July 25th, 1872, a railway company served notice to treat upon G. in respect of part of their works. On January 11th, 1873, G. served a counter-notice requiring the whole property to be taken. On January 24th, 1873, the company gave notice of their desire to have immediate possession, and of their intention to appoint a surveyor. G. then filed a bill for a declaration that the company could not take a part of the works without taking the whole, whereupon the company on February 26th, 1873, gave notice of their intention to withdraw from their notice to treat, offering to pay G.'s costs of suit down to that date (February 26th, 1873) and the costs of the order to stay. G. declined the offer, and

insisted on an answer :—*Held*, that the company's notice of their intention to apply for the appointment of a surveyor did not amount to a binding contract to take the works, and that they were at liberty to withdraw the notice to treat : *Grierson v. Cheshire Lines Committee* (1874), L. R. 19 Eq. 83.

- (v.) If the promoters take possession of that portion of the premises comprised in their notice to treat, they are bound to purchase the whole, if the whole comes within sect. 92 and they are required to do so by a counter-notice.

Illustration.

M. was served with notice by the L. Railway Co. to treat in respect of part of a piece of land ; he required the company to take the whole. The company took possession of the part they required and executed a bond. M. obtained a declaration that the company were bound to take the whole. The company did not go into possession of the whole, and took no steps to ascertain the purchase-money :—*Held*, that M. was entitled to an order directing the company forthwith to proceed to ascertain the purchase-money of the whole, and to a declaration of lien : *Marson v. London, Chatham and Dover Ry.* (1869), L. R. 7 Eq. 546.

NOTE.—“ That case [*Marson v. London, Chatham and Dover Ry.*] differs entirely from this in this respect : there there had been a litigation disposed of by a decree, and no question was raised by the defendants whether they were or were not bound to fulfil the contract. The decree having been in the terms in which it appears to have been made, there was no other mode on further consideration of dealing with the matter. The decree had settled that the defendants were to be purchasers ; they did not dispute it themselves, and thereupon the duty was incumbent upon them to do that which was necessary in order to give full effect to the decree, and that is all the order on further consideration did ” : *per* Bacon, V.-C., in *Grierson v. Cheshire Lines Committee* (1874), L. R. 19 Eq. at p. 89.

- (vi.) If after counter-notice the promoters withdraw the notice to treat a subsequent withdrawal of the counter-notice will not revive the notice to treat.

Illustration.

A railway company served on Q. a notice to treat on August 20th, 1864. On October 1st, 1864, Q. served a counter-notice requiring the company to take the whole property. On November 25th, 1864, the company withdrew the notice to treat and informed Q. that they had determined not to take any part of the property. On March 13th, 1865, Q. withdrew his counter-notice and afterwards sought to compel the company to take the part. A rule *nisi* for a *mandamus* was refused : *Ex parte Quicke* (1865), 12 L. T. 580.

- (c) A notice to treat is indivisible.

A notice to treat is indivisible, and if the counter-notice is given with respect to part of the property included in the notice to treat the promoters may abandon the notice to treat in its entirety.

Illustration.

T. was the owner of two adjacent villas, E. villa and W. villa. A company gave T. notice to treat for E. villa and a strip of land at the back thereof which formed part

of the garden of W. villa. T. thereupon gave a counter-notice requiring the company to take the whole of W. villa. The company then gave notice abandoning the notice to treat. T., however, contended that he was entitled to treat the notice given as applicable to E. villa without the strip of land at the back, and his arbitrator proceeded *ex parte* to award compensation in respect of E. villa:—*Held*, that there was only one notice to treat, and that the company could not be compelled to take the villa mentioned in the notice to treat without the strip of the other: *Thompson v. Tottenham and Forest Gate Ry.* (1892), 67 L. T. 416.

(d) The counter-notice must require the promoters to take the whole of the house or other building or manufactory, and not a larger portion than they have included in their notice to treat, but less than the whole.

Illustration.

"I do not think that, in cases of this nature, a plaintiff can be entitled to insist that some portion of his property shall be taken as part of his house, and that another portion of it, which is precisely in the same position, shall not be so taken. To hold this would be in some cases to enable a plaintiff to retain what is valuable, and to throw upon railway companies what may be of little or no value": *per* Turner, L.J., in *Pulling v. London, Chatham and Dover Ry.* (1864), 33 L. J. Ch. 505 at p. 509.

(e) Deposit on taking possession under sect. 85.

If a valid counter-notice is given, the promoters must deposit the value of the whole of the property before they can take possession, under sect. 85, of any part.

Illustrations.

(1) A railway company gave U. notice to treat for a part of his house, outbuildings and gardens. It did not appear that written counter-notice was given, but U.'s solicitor verbally required the agent of the company to purchase the whole, and negotiations took place for such purchase by the company. Pending negotiations the company complied with sect. 85 as to the part they required. After the deposit a single arbitrator was agreed on for fixing compensation for the whole. The arbitration proceeded, and the arbitrator gave notice to the company that his award was ready. The company took exception to some proceedings by the arbitrator, disputed the validity of his award, and entered into possession of the part in respect of which they had originally made the deposit. U. filed a bill to restrain them from continuing in possession of the land or using the same for the purposes of their railway until compensation for the whole was paid to him:—*Held*, that after counter-notice the amount to be secured by deposit and bond under sect. 85 before the company can take possession of property they require is the value of the entire property, not of the portion actually required by the company: *Underwood v. Bedford and Cambridge Ry.* (1859), 7. Jur. (N.S.) 941.

(2) A railway company gave D. notice to treat for part of a house, outbuildings and garden. Negotiations took place, during which D.'s solicitor required the company to purchase the whole property. Pending these negotiations the company made a deposit representing the value of the part required and executed a bond. D. sought to restrain the company from proceeding until compensation for the whole had been paid:—*Held*, that before the company could take possession they were bound to secure an amount representing the value of the whole property: *Dodson v. East Kent Ry.* (1859), 7 Jur. (N.S.) 941.

(3) Notice was given to G. by a railway company that they would require part of his workshop for the purposes of their railway. G. gave the company a counter-notice, under sect. 92, that they must take the whole. The company, however, took possession of part only; and paid into court the ascertained value of that part :—*Held*, that there was no right under sect. 85 to enter on a part of the property paying in the value of that part only, but that the company were bound to pay into court the value of the whole premises : *Giles v. London, Chatham and Dover Ry.* (1861), 30 L. J. Ch. 603.

(f) Where the promoters are empowered to take part only of premises and there is a material detriment clause, the owner cannot compel the promoters to deposit more than the value of the part unless and until he has obtained a finding by a jury or an arbitrator that there will be material detriment by the severance.

Illustrations.

(1) The M. Railway was entitled by special Act to acquire compulsorily an easement of tunnelling under land unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land. On January 30th, 1882, the company gave the plaintiff a notice to treat for the easement or right of constructing a tunnel. On February 10th the plaintiff wrote to the company that such easement could not be acquired without material detriment. On April 14th, 1882, the company gave the plaintiff notice that they intended to exercise the power of entry under sect. 85 and to apply to the Board of Trade for the appointment of a surveyor to determine the value of the easement. The plaintiff contended that the notice to the Board of Trade should be amended and their surveyor be instructed to make a valuation of the land and houses over the tunnel, so that the plaintiff might have sufficient security. The company refused to allow the notice to be amended, and a surveyor was appointed to estimate the amount to be deposited as a security under sect. 85 for the purpose of enabling the company to construct the tunnel. The plaintiff then sought to restrain the company from entering on the land for the purpose of making the tunnel unless they included the whole of the houses in their notice to treat and gave him a bond for the value thereof :—*Held*, that the company might enter upon the land for the purpose of making the tunnel upon depositing the value of the easement, and that they could not be compelled to deposit the value of the whole land : *Hill v. Midland Ry.* (1882), 21 Ch. D. 143. "The Legislature thought that the company had made out a *prima facie* case to show that at the depth of fifty feet their tunnel would do no harm, and that unless that *prima facie* case could be rebutted by the landowner before the jury or before the arbitrator, the landowner was to have no right whatever to require them to take the other portion of the land. I think, therefore, that the railway company are justified in the present state of circumstances, and, before any finding by a jury in favour of the plaintiff, in insisting upon their right to enter upon the space to be occupied by their tunnel upon depositing the assessed value of that right or easement and without depositing any further moneys": *per Fry, J.* at p. 148, *ib.*

(2) A railway company was, by a special Act, empowered to take part only of certain buildings if, in the opinion of a jury or arbitrators, such portions could be severed without material detriment to the remainder. The arbitrator decided that the part of the plaintiff's buildings required could be severed from the remainder without material detriment thereto, and assessed the value and the compensation. The plaintiff traversed the award. Pending the hearing of the traverse, the company took possession after depositing the value of the part taken :—*Held*, that the entry was lawful : *Lambert v. Dublin, Wicklow and Wexford Ry.* (1890), 25 L. R. Ir. 163.

(g) Invalid notice to treat.

A valid counter-notice may disentitle the owner to object to the invalidity of a notice to treat by setting up an equity against himself to complete the contract to sell the whole which he has virtually entered into.

Illustrations.

(1) A. was the owner of a field, the whole of which was contained in the books of reference of a railway company, but fifteen perches of it lay beyond the limits of deviation laid down in the plans. The company served a notice upon A. requiring part of the field for the purpose of the railway. A. then gave notice to the company that if they took part they must take the whole, to which they agreed. A. afterwards receded from his notice. The company then entered upon the whole under sect. 85:—*Held*, that the question whether the fifteen perches were necessary for the works was for the jury, and also that A., having required the company to take the whole, could not object that their entry on that portion was unlawful: *Doe d. Armistead v. North Staffordshire Ry.* (1851), 20 L. J. Q. B. 249.

(2) The promoters in July, 1853, gave notice to treat for an easement or right to widen the railway by iron beams resting on piers erected outside the plaintiff's premises. Immediately thereupon the plaintiff gave a counter-notice requiring the promoters to take the whole manufactory. In May, 1854, the promoters gave the plaintiff notice of their intention to summon a jury to assess the value of the easement. An injunction was then granted restraining the promoters from proceeding on their notice unless they took the whole manufactory, the plaintiff undertaking to sell the same. The promoters then abandoned their first notice, and gave notice to summon a jury to assess the whole. The plaintiff then applied for an injunction to restrain the promoters from proceeding on this notice; but the injunction was refused, on the ground that the plaintiff, by having given notice that he was willing to sell, had drawn the promoters into the position of carrying on their works upon the faith that the plaintiff would complete his contract: *Pinchin v. London and Blackwall Ry.* (1854), 24 L. J. Ch. 417.

IX. Invalid counter-notice.

(a) If the counter-notice is invalid it is in no way binding on the promoters, and they may disregard it.

Illustrations.

(1) "As the plaintiff failed in the counter-notice which he gave to require the company to take what they were bound to take, he is not in a position to say that the railway company, before they acted upon the notice to treat which they gave, were bound to wait until a proper notice to take the whole of No. 1 was given. The plaintiff placed his right upon his allegation that No. 1 and No. 2 must be taken together. No other counter-notice was given, and until a proper counter-notice was given, it appears to me that the railway company were free to proceed under their own notice to treat": *per* Lord Cairns, C., in *Harvie v. South Devon Ry.* (1874), 32 L. T. at p. 2.

(2) *Treadwell v. London and South-Western Ry.* (1884), 51 L. T. 894 (*see* Illustration, *post*, p. 627).

(3) The respondent served two counter-notices upon the appellants which were *held* by Fry, J., to be bad. The company paid into the bank, by way of deposit, the value of the land required, not of the amount of land comprised in the invalid counter-notices, and afterwards took possession under sect. 85:—*Held*, that the course taken by the appellants was legal and regular: *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480.

(b) If the counter-notice requires the promoters to take the whole of a house, building, &c., and something more is included in the whole than ought properly to be included, it would seem that the counter-notice is not bad as to the part which the promoters can be compelled to take.

Illustration.

A special Act provided that if any owner required the promoters to treat for the whole of a house, warehouse, &c., he should not be compellable to sell part. By one of the sections it was further provided that if the owner of any house, manufactory, ground or building, which should be situate within fifty feet of the railway, should give notice to the company to purchase his interest in such houses, manufactories, &c., the company should treat for the purchase of his interest in the houses, manufactories, &c., mentioned in such notice, and in case they should not agree, the compensation should be settled by a jury. S. & Co. were lessees of premises on which were a vinegar manufactory, warehouses, &c., a principal dwelling-house and garden, and five smaller dwelling-houses. The premises were so situated that a straight line drawn parallel to the railway at the distance of fifty feet would divide the principal dwelling-house and garden, but would pass between the rest of the premises and the railway. S. & Co. required the company to purchase their interest in the whole property. The company refused, but offered to purchase the principal dwelling-house and garden :—*Held*, that the Act did not require them to purchase more : *R. v. London and Greenwich Ry.* (1842), 3 Q. B. 166.

(c) The acceptance of a bad counter-notice by the solicitors to the promoters does not bind the promoters.

Illustration.

The L. Railway Co. served notice on T. to treat for certain property. T. served a counter-notice to take other property. The company's solicitor wrote accepting the counter-notice, and an offer for the whole property was made, but not accepted. The company then refused to take more than was comprised in the notice to treat. The counter-notice was held to be bad :—*Held*, that the acceptance of the bad counter-notice by their solicitor did not bind the company : *Treadwell v. London and South-Western Ry.* (1884), 54 L. J. Ch. 565.

X. Abandonment of counter-notice.

The counter-notice may, it would seem, be withdrawn at any time before the promoters have assented to it or if they have abandoned or withdrawn their notice to treat, provided that the owner has not raised some equity against himself by drawing the promoters into an adverse position on the faith that the owner would complete his contract : see *Pinchin v. London and Blackwell Ry.* (1854), 24 L. J. Ch. 417 (p. 626); and *Schwinge v. London and Blackwall Ry.* (1855), 24 L. J. Ch. 405 (*ante*, p. 621).

NOTE.—There does not seem to be any general principle which prevents a second counter-notice being given after the first has been withdrawn provided it is given in time, and provided the right under sect. 92 has not, owing to the circumstances of the withdrawal, been waived.

XI. Practice and procedure.

(a) Form of counter-notice.

No form of counter-notice is specified in the Act. It is, however, prudent, and in practice is usual, to serve a notice in writing upon the promoters, although it has been held that a verbal communication between the surveyors of the parties, followed by a suit to restrain the promoters from taking possession of the part, is sufficient; the issue of the writ being looked upon as a good counter-notice. Similarly a conversation between the solicitors to the parties, followed by the filing of a bill to restrain the promoters from taking possession of the part, has been held a good counter-notice.

Illustrations.

(1) In 1847 the G. W. Railway gave S. notice of their intention to take part of his manufactory. The company not having taken active steps on the notice of 1847, S. sued out a *mandamus* to compel them, but did not prosecute it. The compulsory powers of the Act of 1847 expired and were renewed by an Act of 1852, under which the company issued a new notice respecting the premises in question. S.'s solicitor afterwards verbally informed the defendants' solicitor at a casual meeting that the plaintiff wished to part with the whole, and not a part only, of his premises. The company thereafter, without communication with the plaintiff, procured their surveyor to be appointed by two justices under the Lands Clauses Act, and he valued that portion which they wished to take. The company then paid the sum into court, and executed a bond as required by the Act and entered and commenced work:—*Held*, that the plaintiff was entitled by his bill to give notice of his intention to part with the whole, and not a part only, of his premises; and an injunction was granted accordingly restraining the company from entering on the premises until the value should be properly ascertained: *Spackman v. G. W. Ry.* (1855), 1 Jur. (N.S.) 790.

(2) A railway company having given notice to the plaintiff of their intention to take a portion of the sites of some houses belonging to the latter, the surveyors of the parties met, and there was a verbal understanding between them that the company should take the whole of the sites of the houses. There was no written counter-notice on the part of the plaintiff requiring the defendants to take the whole of the sites of the houses:—*Held*, that the plaintiff was justified on the verbal understanding only in filing a bill to restrain the defendants, who had paid the lesser sum only into court, from taking possession until the purchase-money for the whole of the sites had been paid: *Binney v. Hammersmith and City Ry.* (1863), 8 L. T. 161.

(b) Contents of counter-notice.

- (i.) The counter-notice is not invalid because it contains an offer to sell the portion required at a certain price and in the alternative requires the promoters to take the whole.

Illustration.

G. received notice from a railway company to treat for part of his premises. His solicitors wrote to the defendants as follows: "Messrs. Gardner consider that their premises will be damaged to the extent of 800*l.*, the sum claimed for the property required

by the railway, and are not disposed to agree to take less. If you cannot advise this amount to be given, they will require the company to take all the premises, for which they will want 3,000*l*." The company entered upon the part they required, and G. brought an action to compel them to take the whole of the premises under sect. 92 :—*Held* that, by offering to sell a part at a price that was refused, G. had not precluded himself from compelling the company to take the whole of his premises, and that the letter was a sufficient notice : *Gardner v. Charing Cross Ry.* (1862), 2 J. & H. 248. See also *Lavers v. London County Council* (1905), 21 T. L. R. 695.

- (ii.) The owner is not bound to state in his counter-notice that the property in question constitutes a "house," or a "building," or a "manufactory," or to give reasons why he claims the right to compel the promoters to take the whole.

Illustration.

"He [the owner] is not obliged to say exactly in what light he views his property. He is not obliged to say, 'I ask you to take it because it is part of a house,' or 'I ask you to take it because it is part of a building,' or 'I ask you to take it because it is part of a manufactory.' He is not obliged to tell his adversary, the company, exactly the ground upon which he is going to bring himself within the Act of Parliament": *per* James, L.J., in *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. 425 at p. 433.

- (iii.) If property described in the notice as a manufactory is held to be a house, or *vice versa*, the notice is not thereby invalidated.

Illustration.

"Whether or no he [the owner] describes it inaccurately as a manufactory when he ought to have described it as a house, or as a building when it ought to be described as a house, or *vice versa*, is, in my opinion, immaterial": *per* Cotton, L.J., in *Richards v. Swansea Improvement and Tramways* (*supra*), at p. 438.

(c) Enforcing counter-notice.

(i.) Injunction.

Illustration.

An owner may, after giving a counter-notice (when the promoters are attempting to put in force their compulsory powers as to the part comprised in the notice to treat), bring an action and move for an injunction to restrain the promoters from taking further proceedings to assess the amount of such compensation and from entering upon or taking any other proceedings for the purpose of obtaining possession of the part comprised in the notice to treat : *Barnes v. Southsea Ry.* (1884), 27 Ch. D. 536 (see also *King v. Wycombe Ry.* (1860), 28 Beav. 104).

NOTE (1).—A lessee not in occupation of the premises may not be entitled to the same remedies.

Illustration to Note (1).

A railway company gave notice to treat with respect to a portion of a house, shop, and outbuildings which had been occupied together, coffee being roasted in the outbuildings and sold in the shop. The company gave a bond for the estimated value (600*l*.), which sum was paid into court, and took possession. The lessee filed her bill to restrain the company from continuing in possession, on the ground (*inter alia*) that the buildings taken were

part of a manufactory, and that the whole must be taken :—*Held*, that as the only complaining party (the lessee) was not in occupation of the premises and was not under any personal inconvenience pending an action at law, and as the company were, in any event, entitled to take the property, an injunction was refused upon the company paying into court a further sum of 600*l.* and undertaking to abide by any order the Court might make as to proceeding before a jury, and as to the possession of the buildings : *Dakin v. London and North-Western Ry.* (1849), 3 De G. & Sm. 414.

(ii.) Declaration.

Illustration.

An owner may, after giving a counter-notice (when the promoters are not attempting to put in force their compulsory powers as to the part comprised in the notice to treat), bring an action and ask for a declaration that he ought not to be compelled to sell the part comprised in the notice to treat or in the alternative any part of the house or other building or manufactory, as the case may be, and for an injunction in accordance with the declaration : *Richards v. Swansea Improvement and Tramways* (1878), 9 Ch. D. 425.

NOTE (2).—When the owner is entitled to a declaration that the promoters must take the whole, it will be granted subject only to the plaintiffs establishing a good title, or upon their undertaking to do so : see *Sparrow v. Oxford, Worcester and Wolverhampton Ry.* (1852), 2 De G. M. & G. 94 ; *Marson v. London, Chatham and Dover Ry.*, *infra* ; *Falkner v. Somerset and Dorset Ry.* (1873), L. R. 16 Eq. 458.

(iii.) Specific performance.

Illustration.

Where promoters have not assented to the counter-notice and are still at liberty to withdraw their notice to treat, specific performance should not be asked for : *Grierson v. Cheshire Lines Committee* (1874), L. R. 19 Eq. 83.

(iv.) Order to assess and pay value.

Illustration.

If a decision has been obtained against the promoters that the whole premises, of which they had gone into possession of part, constitute a house or other building or manufactory, and they refuse to take the whole, an order should be obtained compelling them to take all necessary and proper proceedings under the Act for the purpose of ascertaining the value of the whole, and to pay such value within a certain time of its being ascertained, and that until payment the owner shall have a lien on the property : *Marson v. London, Chatham and Dover Ry.* (1869), L. R. 7 Eq. 546.

Intersected Lands.

And with respect to small portions of intersected Land, be it enacted as follows :

Owners of intersected Lands may insist on Sale.

93. If any Lands not being situate in a Town or built upon shall be so cut through and divided by the Works as to leave, either on both Sides or on one Side thereof, a less Quantity of Land than Half a Statute Acre, and if the Owner of such small Parcel of Land require

the Promoters of the Undertaking to purchase the same along with the other Land required for the Purposes of the Special Act, the Promoters of the Undertaking shall purchase the same accordingly, unless the Owner thereof have other Land adjoining to that so left into which the same can be thrown, so as to be conveniently occupied therewith; and if such Owner have any other Land so adjoining, the Promoters of the Undertaking shall, if so required by the Owner, at their own Expense, throw the Piece of Land so left into such adjoining Land, by removing the Fences and levelling the Sites thereof, and by soiling the same in a sufficient and workmanlike Manner.

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I. This section provides for the case of intersected lands, where a quantity of less than half an acre is cut off from the rest by the works.

In such case the promoters must purchase the land cut off, if required so to do, unless such land can be conveniently occupied with adjoining land of the same owner; in which case the promoters must, if so required, throw the land cut off into the adjoining land.

II. The section does not apply to land situate in a town or built upon.

(a) As to the meaning of "situate in a town," the following extracts from judgments will afford the best definition.

Illustrations.

(1) Upon the trial of an issue whether a railway was passing through a "town" within this section, the judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense:—*Held* a misdirection, inasmuch as the judge ought to have given such a definition of the word "town" as would have enabled the jury to decide the issue. "Town" means here a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses; and, *semble*, all open spaces occupied as mere accessories to such houses, although not so surrounded: *Elliott v. South Devon Ry.* (1848), 2 Ex. 725.

(2) A local and personal Act created trustees of certain turnpike roads which were described by definite points, some in the town of T. The Act was to be in operation for

thirty-one years. Sect. 27 enacted that it should not be lawful for the trustees to continue or erect any turnpike or tollgate across the roads in the towns of T. and W., or in any other town through or into which the said roads might pass or be made :—*Held*, on indictment for erecting and continuing a turnpike gate within the town of T.—(1) that the jury were rightly directed that the word “towns” was to be understood in a popular sense as a congregation of houses, and they were to consider whether the spot where the gate stood was surrounded by houses so reasonably near that the inhabitants might fairly be said to dwell together ; (2) that a gate was unlawfully built or continued which stood across the road within the town of T. as constituted for the time being, and that the enactment was not confined to the town as it was at the time when the Act passed : *R. v. Cottle* (1851), 16 Q. B. 412.

(3) A railway company under compulsory powers had acquired land situate within the limits of the borough of Wycombe, but at some distance from the mass of houses forming the town. There were two cottages on the land. It was *held* that the land was not land in a town, nor land built upon or used for building purposes : *Curington (Lord) v. Wycombe Ry.* (1868), L. R. 3 Ch. 377.

(4) Lands near Teddington situate close to the railway station and not continuously built upon were *held* in 1870 not to be lands within a town nor lands used for building purposes. And lands acquired by a railway company for the purposes of the railway, but not so employed, and merely capable of being afterwards used for building purposes, are not on account of such capacity alone to be treated as building land or land “used for building purposes” : *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610. “The definition amounts to this—that where there is such an amount of continuous occupancy of the ground by houses that persons may be said to be living, as it were, in the same town or place continuously, there for the purposes of the railway Acts, and according to the popular sense of the word, and not the legal sense, which would not give at all a sensible definition, the place may be said to be a town” : *per* Hatherley, L.C., at p. 615, *ib.*

(5) “Looking at the definition of a ‘town’ in the various cases that have been cited, I think as the result of the whole it may be said that to constitute a ‘town’ there must be a continuity, though not necessarily an absolute contiguity, of buildings ; that is to say, a spot to be said to be within a town must, in the language of Alderson, B., in *Elliot v. South Devon Ry.* (*ante*), be ‘where a great body of people are congregated together in houses,’ or, as Parke, B., said in the same case, ‘a place containing a number of houses congregated together, an inhabited spot where the occupation is continuous.’ These expressions correspond with the definition of a town given by the Recorder of London in the case of *R. v. Cottle* (1851), 16 Q. B. 412, which was quoted with approbation by Lord Hatherley in the case of *London and South-Western Ry. v. Blackmore*” (*ante*) : *per* Kelly, C.B., in *Deards v. Goldsmith* (1879), 40 L. T. at p. 331.

(b) Land may be situate within the municipal boundaries of a city and yet not be “situate in a town.”

Illustration.

Land situate within the municipal boundary of the city of Bath, but not surrounded by dwelling-houses, was used as a market garden. A railway company made a tunnel through the land, which passed under a cottage situate thereon and divided the land into two portions, one of which was less than half an acre :—*Held*, that the premises were not in a town within the meaning of sect. 93, and that the company were bound to take the land above the tunnel, the cottage and the severed part, which was less than half an acre : *Falkner v. Somerset and Dorset Ry.* (1873), L. R. 16 Eq. 458.

III. If it is intended that the value of the land severed and purchased by the promoters should be assessed with the value of the land taken, this should be included in the submission, otherwise the award may be held bad.

Illustration.

A railway company having given notice to treat, the landowners claimed compensation in respect of the lands included in the notice, and also of other lands severed by the railway and of less than half an acre. The award gave one entire sum for the purchase of the land included in the notice, and also of the severed lands. The award was held bad on the construction of the notices, there being no valid submission in respect of the severed lands : *In re North Staffordshire Ry. and Wood* (1848), 2 Ex. 244.

Promoters of the Undertaking may insist on Purchase where Expense of Bridges, &c., exceeds the Value.

94. If any such Land shall be so cut through and divided as to leave on either Side of the Works a Piece of Land of less Extent than Half a Statute Acre, or of less Value than the Expense of making a Bridge, Culvert, or such other Communication between the Land so divided as the Promoters of the Undertaking are, under the Provisions of this or the Special Act, or any Act incorporated therewith, compellable to make, and if the Owner of such Lands have not other Lands adjoining such Piece of Land, and require the Promoters of the Undertaking to make such Communication, then the Promoters of the Undertaking may require such Owner to sell to them such Piece of Land, and any Dispute as to the Value of such Piece of Land, or as to what would be the Expense of making such Communication, shall be ascertained as herein provided for Cases of disputed Compensation ; and on the Occasion of ascertaining the Value of the Land required to be taken for the Purposes of the Works, the Jury or the Arbitrators, as the Case may be, shall, if required by either Party, ascertain by their Verdict or Award the Value of any such severed Piece of Land, and also what would be the Expense of making such Communication.

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I. Under this section promoters may compel the sale to themselves of small portions of intersected land if—

(a) The land severed is less than half an acre in extent, or is of less value than the expense of making the prescribed communication ; and

(b) The owner of such land shall not have lands adjoining such piece of land ; and

(c) The owner of such piece of land shall require the promoters of the undertaking to make such communication as under this or the special Act or any Act incorporated therewith they are compellable to make.

II. The words “any such land” do not refer to “lands not being situate in a town or built upon,” but mean “any small portion of intersected land,” so that the rights of promoters under this section include all lands whether in a town or not.

Illustration.

An action was brought against a railway company for not making a communication between small portions of intersected lands as required by sect. 93. The company claimed the benefit of sect. 94, and pleaded that the lands were not situate in a town. This averment was found against them, but it was *held* to be immaterial: *Eastern Counties Ry. v. Marriage* (1860), 9 H. L. Cas. 32. “By sect. 93 the owner may compel the company to buy rural land, because an isolated patch may be a waste for agricultural use. By sect. 94 the company may compel a sale of an isolated patch, rather than make a bridge to it”: *per* Erle, C.J., at p. 66, *ib.*

III. In the case of railway companies, the promoters may be bound to make the communications required by the landowner if they can be brought under the head of accommodation works provided for by sect. 68 of the Railways Clauses Act, 1845 (*post*).

Illustration.

Land cut off by a railway embankment from other land of the same owner was of less value than the expense of making a communication between the intersected lands. The company called upon the owner to sell the land cut off, which he refused to do ; and compensation having been assessed, they tendered the amount of the valuation and claimed that the land vested in them. It was *held* that the communication between the lands ought to have been made, it being required not only for the purpose of connecting the intersected lands, but for the use and enjoyment thereof for bathing, boating and fishing, as the land cut off abutted on the seashore: *Falls v. Belfast and Ballymena Ry.* (1849), 12 Ir. L. R. 233.

IV. Neither this section nor the 93rd contains any provision as to costs ; and sect. 51 is not incorporated therewith.

Illustration.

A railway company purchased a small piece of land from L. During the period of the construction of the railway L. sold to C. his remaining land, which was severed by the line of railway, and there was no access to it. C. accordingly gave notice to the company, under sect. 68, requiring them to give him means of access, and also means of communication by means of an arch or tunnel, between the severed portions of land. The company,

to save expense, gave C. notice, under sect. 94 of the Lands Clauses Act, requiring him to sell the intersected land. C. required the company to make the communication, and expressed his desire not to sell. The company then issued their warrant for a jury, and a verdict was found that the value of the land was less than the expense of making the communication. No offer had been made to C. as to the land before the inquiry, and he claimed his costs under sect. 51:—*Held*, that sect. 51 was not incorporated with sect. 94. and that C. was not entitled to the costs: *In re Cobb and Mid-Wales Ry.* (1866), L. R. 1 Q. B. 342. "On looking more closely at the 94th section, the only conclusion that we can come to, in my opinion, is that this is a *casus omissus*, and the framer of this section had not present in his mind the whole of the enactments applicable to the ordinary cases of disputed compensation, nor the requirements and preliminaries which must exist in order to give the claimant costs, or to entitle the company to be free from them": *per Cockburn, C.J.*, at p. 348, *ib.*

NOTE.—As to compensation by a jury, *see* sect. 38, *ante*; and as to arbitrators, *see* sect. 25, *ante*.

Copyholds.

And with respect to Copyhold Lands, be it enacted as follows:

95. Every Conveyance to the Promoters of the Undertaking, of any Lands which shall be of Copyhold or Customary Tenure, or of the Nature thereof, shall be entered on the Rolls of the Manor of which the same shall be held or parcel; and on Payment to the Steward of such Manor of such Fees as would be due to him on the Surrender of the same Lands to the Use of a Purchaser thereof he shall make such Enrolment; and every such Conveyance, when so enrolled, shall have the like Effect in respect of such Copyhold or Customary Lands, as if the same had been of Freehold Tenure, nevertheless, until such Lands shall have been enfranchised by virtue of the Powers herein-after contained, they shall continue subject to the same Fines, Rents, Heriots, and Services as were theretofore payable and of Right accustomed.

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I. The effect of the section.

This section provides for the enrolment of conveyances of copyholds on the court rolls of the manor, by which the promoters become seised of the

land in fee simple, but subject to the incidents of copyhold tenure until enfranchisement is effected as provided by sects. 96 and 97.

Illustration.

The section "provides for what is to be done as between the company and the copyholders": *per* Lindley, L.J., in *Lowther v. Caledonian Ry.*, [1892] 1 Ch. at p. 80.

II. Effect of non-compliance with the section.

If there is no enrolment, the lord's rights are in no way affected, and the land remains copyhold.

Illustrations.

(1) A copyholder conveyed his land to a company under their special Act, and the company entered on the land. On the death of the copyholder, no other person having been admitted, the lord seized *quousque* for want of a tenant. He was *held* entitled to maintain ejectment and a claim for mesne profits against the company, as no interest of his had passed to the company by virtue of the copyholder's conveyance: *Dimes v. Grand Junction Canal* (1846), 9 Q. B. 469 (and see 15 Sim. 402; 12 Beav. 63).

(2) Under a special Act a canal was made through copyhold lands which were subject to a lease. Compensation was paid to the lessees, but not to the lord of the manor. On the determination of the lease the reversioners recovered the land, but were *held* bound to convey it to the canal company on payment of compensation: *Beaufort (Duke) v. Patrick* (1853), 17 Beav. 60.

III. Fees and fines payable (and see *post*, p. 639).

The fee payable to the steward is only the surrender fee; and the lord cannot claim a fine which is due to him by custom upon surrender and admittance when the conveyance is enrolled.

Illustrations.

(1) The steward of a manor was entitled by custom to a fee upon surrender, and another fee upon admittance to a copyhold. On the enrolment of a conveyance to a railway company he claimed both fees. He was *held* to be only entitled to the fee on a surrender: *Cooper v. Norfolk Ry.* (1849), 3 Ex. 546.

(2) By the custom of a manor the lord was entitled to a fine upon every alienation by surrender and admittance. Copyhold land parcel of the manor was conveyed to a railway company, and the conveyance was enrolled. The company applied for enfranchisement under the 96th section. The lord was *held* not entitled to any fine upon the conveyance or the enrolment, nor to include the amount of a fine upon alienation by surrender and admittance in estimating the compensation due in respect of the enfranchisement: *Ecclesiastical Commissioners v. London and South-Western Ry.* (1854), 14 C. B. 743.

Copyhold Lands to be enfranchised. **96.** Within Three Months after the Enrolment of the Conveyance of any such Copyhold or Customary Lands, or within one Month after the Promoters of the Undertaking shall enter upon and make use of the same

for the Purposes of the Works, whichever shall first happen, or if more than one Parcel of such Lands holden of the same Manor shall have been taken by them, then within One Month after the last of such Parcels shall have been so taken or entered on by them, the Promoters of the Undertaking shall procure the whole of the Lands holden of such Manor so taken by them to be enfranchised, and for that Purpose shall apply to the Lord of the Manor whereof such Lands are holden to enfranchise the same, and shall pay to him such Compensation in respect thereof as shall be agreed upon between them and him, and if the Parties fail to agree respecting the Amount of the Compensation to be paid for such Enfranchisement the same shall be determined as in other Cases of disputed Compensation; and in estimating such Compensation the Loss in respect of the Fines, Heriots, and other Services payable on Death, Descent, or Alienation, or any other Matters which would be lost by the vesting of such Copyhold or Customary Lands in the Promoters of the Undertaking, or by the Enfranchisement of the same, shall be allowed for.

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I. Effect of the section.

(a) This section compels the promoters to procure, and the lord of the manor to grant, enfranchisement.

Illustration.

"It is quite obvious, from the language of the section, that on the happening of the first of the events mentioned in the section there is a duty cast upon the promoters to procure enfranchisement, and there is a duty cast upon the lord to enfranchise, and either party can enforce the duty against the other. I take it to be perfectly plain that if the promoters do not proceed to enfranchise, the lord, if he chose, could obtain a *mandamus* to compel them to do so. As soon as the first of the two events occurs there arises an obligation to enfranchise. That is the key of the whole matter; the rights of the parties

are settled as from that time. The enfranchisement has begun though it is not yet completed" : *per* Lindley, L.J., in *Lowther v. Caledonian Ry.*, [1892] 1 Ch. at p. 81 (and see sect. 95).

(b) Where compensation is not at once assessed, it must be assessed as from the date of the happening of the first of the two events mentioned in the section. Subsequent increase in the value of the land before the date when the assessment is actually made will not be regarded in assessing compensation.

Illustrations.

(1) Copyholds were conveyed to a railway company in 1861 and 1863, the conveyances being entered on the court rolls. In 1862 and 1863 other copyholds of the same manor were surrendered to nominees on behalf of the company who were admitted. Buildings were erected on part of the land, and in 1876 the lord and the company entered into an agreement for the enfranchisement of the whole. It was *held* that the compensation must be assessed on the basis of being assessed at the expiration of one month after the company entered on and made use of the lands : *In re Salisbury (Marquis) and London and North-Western Ry.*, (1879) [1892] 1 Ch. 75, n.

(2) The defendant company, acting under statutory powers, in 1873 took possession of some copyhold lands, and erected upon them cottages and constructed a reservoir and other works. At a later date the copyhold tenants executed, under the Lands Clauses Act, conveyances by deed of the lands to the company, and the deeds were shortly afterwards enrolled, but the company took no steps to obtain enfranchisement, in consequence whereof the lord served a notice requiring the company to take enfranchisement and pay him the compensation. The practice was to charge two years' improved annual value on death and three years' value on alienation :—*Held*, that sect. 96 fixes the time when the obligation to enfranchise arises, and from which the rights of the parties are settled, as three months after enrolment of the conveyance, or one month after entry, whichever shall first occur ; and that the value for enfranchisement must be assessed at that period, but that any interim fines should be paid on the basis of the improved value of the land : *Lowther v. Caledonian Ry.*, [1891] 1 Ch. 73.

II. Mode of effecting enfranchisement.

(a) The enfranchisement may by agreement be effected under the provisions of the Copyhold Act, 1894, ss. 5—10 ; but in default of such an agreement the enfranchisement must be effected under the provisions of the Lands Clauses Act.

Illustration.

In 1861, 1862, and 1863 certain copyhold lands were acquired by a railway company either directly or through trustees :—*Held*, that all the lands, whether taken directly or through the trustees, must have been acquired only under the provisions of the Lands Clauses Act : hence the enfranchisement of the copyholds must take place under that Act, not under the Copyhold Acts ; and hence the amount of compensation must be assessed on the basis of its being ascertained within one month after entry by the company on the lands, or within three months after the enrolment of the conveyance on the court rolls, whichever first happened : *In re Salisbury (Marquis) and London and North-Western Ry.* [1879] W. N. 214.

(b) Promoters who enfranchise under the Lands Clauses Act are in a position distinct from that of ordinary copyholders: *e.g.*, the amount of fines due upon surrender and admittance of a tenant cannot be claimed as part of "the amount of the compensation to be paid for enfranchisement" (and see *ante*, p. 636).

Illustrations.

(1) A railway company, under its statutory powers, acquired certain copyholds part of a manor:—*Held*, that on a conveyance of such copyholds the lord of the manor was not entitled to a fine on the execution of the conveyance by the copyholder or its enrolment under sect. 95, or as a part of the compensation for loss by the vesting of the land under sect. 96: *Ecclesiastical Commissioners v. London and South-Western Ry.* (1854), 23 L. J. C. P. 177 (and *ante*, p. 636).

(2) Where the amount of such fines was taken into consideration in estimating a lump sum paid as compensation in respect of a settled estate, it was *held* that such amount could not be retained by the tenant for life, but must be applied for the benefit of the inheritance: *In re Wilson* (1863), 2 J. & H. 619. "The tenant for life had no right as against the company to insist on the payment of the fines in question": *per Wood, V.-C.*, at p. 622, *ib.*

III. Time for effecting enfranchisement.

The latest time is clearly stated in the section (see also *In re Salisbury (Marquis)* and *London and North-Western Ry.*, *ante*, p. 638).

Lord of the Manor
to enfranchise on
Payment of
Compensation.

97. Upon Payment or Tender of the Compensation so agreed upon or determined, or on Deposit thereof in the Bank in any of the

Cases herein-before in that Behalf provided, the Lord of the Manor whereof such Copyhold or Customary Lands shall be holden shall enfranchise such Lands, and the Lands so enfranchised shall for ever thereafter be held in Free and Common Soccage; and in default of such Enfranchisement by the Lord of the Manor, or if he fail to adduce a good Title thereto to the Satisfaction of the Promoters of the Undertaking, it shall be lawful for them, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them, and thereupon the Lands in respect of the Enfranchisement whereof such Compensation shall have been deposited as aforesaid shall be deemed to be enfranchised, and shall be for ever thereafter held in Free and Common Soccage.

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I. Effect of the section.*Illustration.*

This section "says how the process of enfranchisement is to be completed . . . so that in order to complete this process of enfranchisement, the compensation must be ascertained ; and it must be paid or tendered or deposited according to the circumstances : and then after that there is to be something else done—I suppose a deed of enfranchisement is to be executed by the lord—and then, and not before, the lands are completely enfranchised" : *per* Lindley, L.J., in *Lowther v. Caledonian Ry.*, [1892] 1 Ch. at pp. 81 and 82 (and see *ante*, sect. 95, I.).

II. Form of the enfranchisement deed.

Questions sometimes arise as to the form of the enfranchisement deed.

Illustration.

Where copyhold land had been taken under the Lands Clauses Acts the promoters claimed to insert in the enfranchisement deed an acknowledgment of their right to production of the documents of title and an undertaking for safe custody by both the lord and his trustee. Bacon, V.-C., suggested that the promoters were not entitled in strictness to an acknowledgment. The lord and the trustee, however, were willing to give such an acknowledgment and the lord to give the undertaking : *In re Agg-Gardner* (1884), 25 Ch. D. 600.

NOTE.—As to this case it may be remarked that it is hard to see why an acknowledgment should not be given ; while it is clear that the trustee could not be forced to give the undertaking (and see *In re Pursell and Deakin's Contract* [1893] W. N. 152).

98. If any such Copyhold or Customary Lands be subject to any customary or other Rent, and Part only of the Land subject to any such Rent be required to be taken for the Purposes of the Special Act, the Apportionment of such Rent may be settled by Agreement between the Owner of the Lands and the Lord of the Manor on the one Part, and the Promoters of the Undertaking on the other Part, and if such Apportionment be not so settled by Agreement, then the same shall be settled by Two Justices ; and the Enfranchisement of any Copyhold or Customary Lands taken by virtue of this or the Special Act, or the Apportionment of such Rents, shall not affect in other respects any Custom by or under which any such Copyhold or Customary Lands not taken for such Purposes shall be held ;

Apportionment of
Copyhold Rents.

and if any of the Lands so required be released from any Portion of the Rents to which they were subject jointly with any other Lands, such last-mentioned Lands shall be charged with the Remainder only of such Rents; and with reference to any such apportioned Rents, the Lord of the Manor shall have all the same Rights and Remedies over the Lands to which such apportioned Rent shall have been assigned or attributed as he had previously over the whole of the Lands subject to such Rents for the whole of such Rents.

This section provides for the apportionment of any rent to which copyhold or customary land may be subject in case part only of the land is taken by the promoters. In other respects the part of the land which is not taken is left unaffected by the enfranchisement; and the rights of the lord are preserved. The apportionment must, in default of agreement, be settled by two justices. Sect. 24 of the Act does not appear to extend to the case of an apportionment as it relates to the method of proceeding for settling "any question of disputed compensation."

Common Lands.

And with respect to any such Lands, being Common or Waste Lands, be it enacted as follows:

99. The Compensation in respect of the Right in the Soil of any Lands subject to any Rights of Common shall be paid to the Lord of the Manor, in case he shall be entitled to the same, or to such Party, other than the Commoners, as shall be entitled to such Right in the Soil; and the Compensation in respect of all other commonable and other Rights in or over such Lands, including therein any commonable or other Rights to which the Lord of the Manor may be entitled other than his Right in the Soil of such Lands, shall be determined, and paid and applied in manner hereinafter provided with respect to Common Lands the Right in the Soil of which shall belong to the Commoners; and upon Payment or Deposit in the Bank of the Compensation so determined all such commonable and other Rights shall cease and be extinguished.

NOTE.—Sects. 99 to 107 are restricted by 62 & 63 Vict. c. 30, s. 22, Sched. I., *post*.

This section deals with the case of common lands, providing that compensation in respect of the right in the soil shall be paid to the lord or other owner and that compensation in respect of the rights of common shall be paid to the persons entitled to such rights.

It does not follow that the lord's right in the soil is lost because there has been an allotment of part of the waste upon trust to permit specified persons to exercise rights of common.

Illustrations.

(1) Under an inclosure Act waste land of a manor was allotted to the lord in trust for the occupiers of certain cottages as a turf common. Part of the land was taken by a railway company. It was *held* that the lord was entitled to part of the purchase-money as owner of the soil: *Att.-Gen. v. Meyrick*, [1893] A. C. 1.

(2) "In the case of *Att.-Gen. v. Meyrick (supra)*, so far from the legal estate being taken away from the lord, the land in question, which originally belonged to him, was allotted to him on trust to allow the same to be used as a turf common by the occupiers of certain cottages, who, being a fluctuating body, were not capable of taking a conveyance of any interest in the land": *per* Rigby, L.J., in *Simcoe v. Pethick*, [1898] 2 Q. B. at p. 563. In that case it was *held* that an allotment of land made in pursuance of sects. 34 and 37 of the Inclosure Act, 1845, to the churchwardens and overseers of a parish in trust to allow the occupiers of certain ancient cottages in the parish to get turf therefrom, vested the legal estate in the land in the churchwardens and overseers.

Lord of the Manor, &c., to convey to the Promoters of the Undertaking on receiving Compensation for his Interest.

100. Upon Payment or Tender to the Lord of the Manor, or such other Party as aforesaid, of the Compensation which shall have been agreed upon or determined in respect of the Right in the Soil of any such Lands, or on Deposit thereof in the Bank in any of the Cases herein-before in that Behalf provided, such Lord of the Manor, or such other Party as aforesaid, shall convey such Lands to the Promoters of the Undertaking, and such Conveyance shall have the Effect of vesting such Lands in the Promoters of the Undertaking in like Manner as if such Lord of the Manor, or such other Party as aforesaid, had been seised in Fee Simple of such Lands at the Time of executing such Conveyance; and in default of such Conveyance it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them, and thereupon the Lands in respect whereof such last-mentioned Compensation shall have been deposited as aforesaid shall vest absolutely in the Promoters of the Undertaking and they shall be entitled to

immediate Possession thereof, subject nevertheless to the commonable and other Rights theretofore affecting the same, until such Rights shall have been extinguished by Payment or Deposit of the Compensation for the same in manner herein-after provided.

This section provides for the conveyance to or vesting in the promoters of land, the soil of which is subject to rights of common.

But until the extinction of the rights of common by payment or deposit of compensation in respect of them, the land will remain subject to such rights in the hands of the promoters, and the rights may be enforced by the persons entitled to them.

Illustration.

Part of Tooting Bec Common was conveyed by the lord of the manor to a railway company, who took possession and constructed their railway, without taking any proceedings to ascertain the compensation to which a tenant of the manor who had a right of common of pasture was entitled. An action for the disturbance of this right by the construction of the railway was *held* maintainable, Lush, J., saying: "The question is whether it is a condition precedent to the right of the railway company to disturb the commoners in their rights of common, that they should first assess and pay the valuation either to the commoners or into the bank. I am of opinion that it is a condition precedent": *Stoneham v. London, Brighton and South Coast Ry.* (1871), L. R. 7 Q. B. 1.

101. The Compensation to be paid with respect to any such Lands, being Common Lands, or in the Nature thereof, the Right to the Soil of which shall belong to the Commoners, as well as the Compensation to be paid for the commonable and other Rights in or over Common Lands the Right in the Soil whereof shall not belong to the Commoners, other than the Compensation to the Lord of the Manor, or other Party entitled to the Soil thereof, in respect of his Right in the Soil thereof, shall be determined by agreement between the Promoters of the Undertaking and a Committee of the Parties entitled to commonable or other Rights in such Lands, to be appointed as next herein-after mentioned.

This section deals with the ascertainment of compensation to be paid to commoners in respect of their commonable rights, and also in respect of their rights (if any) in the soil. If the promoters and the committee of the commoners cannot agree, the parties must proceed under the 105th section, and the amount will be determined as in other cases of disputed compensation under the Act.

Any duly authorised agent can act on behalf of the commoners and enter into a binding agreement with the promoters.

Illustration.

Common lands which had been allotted to parishioners of the borough of Stafford were managed by a committee. A railway company having served on the committee a notice to treat for part of the allotments, a general meeting of the parishioners authorised their chairman to act as agent in the matter, and he and the company's agent executed an agreement for the sale and purchase of the land. The purchase-money not being paid, a bill for specific performance was filed against the company, who pleaded non-compliance with the provisions of the Lands Clauses Act. A decree for specific performance of the agreement was made against the company : *Bee v. Stafford and Uttoxeter Ry.* (1875), 23 W. R. 868.

102. It shall be lawful for the Promoters of the Undertaking to convene a Meeting of the Parties entitled to commonable or other Rights over or in such Lands to be held at some convenient Place in the Neighbourhood of the Lands, for the Purpose of their appointing a Committee to treat with the Promoters of the Undertaking for the Compensation to be paid for the Extinction of such commonable or other Rights ; and every such Meeting shall be called by public Advertisement, to be inserted once at least in Two consecutive Weeks in some Newspaper circulating in the County or in the respective Counties and in the Neighbourhood in which such Lands shall be situate, the last of such Insertions being not more than Fourteen nor less than Seven Days prior to any such Meeting ; and Notice of such Meeting shall also, not less than Seven Days previous to the holding thereof, be affixed upon the Door of the Parish Church where such Meeting is intended to be held, or if there be no such Church some other Place in the Neighbourhood to which Notices are usually affixed ; and if such Lands be parcel or holden of a Manor, a like Notice shall be given to the Lord of such Manor.

Meeting to appoint
a Committee.

103. It shall be lawful for the Meeting so called to appoint a Committee, not exceeding Five in Number, of the Parties entitled to any such Rights ; and at such Meeting the Decision of the Majority of the Persons entitled to Commonable Rights present shall bind the Minority and all absent Parties.

These sections, which deal with the appointment of a committee of the persons entitled to commonable rights provided for by the 101st section, are optional, and need not be followed if a binding agreement can be arrived at aliunde.

The promoters may convene a meeting of commoners, and if they do the meeting must be convened by advertisement and notice; and the members of the committee appointed by the meeting must be commoners.

Committee to
agree with the
Promoters of the
Undertaking.

104. It shall be lawful for the Committee so chosen to enter into an Agreement with the Promoters of the Undertaking for the Compensation to be paid for the Extinction of such commonable and other Rights, and all Matters relating thereto, for and on behalf of themselves and all other Parties interested therein; and all such Parties shall be bound by such Agreement; and it shall be lawful for such Committee to receive the Compensation so agreed to be paid, and the Receipt of such Committee, or of any Three of them, for such Compensation, shall be an effectual Discharge for the same; and such Compensation, when received, shall be apportioned by the Committee among the several Persons interested therein, according to their respective Interests, but the Promoters of the Undertaking shall not be bound to see to the Apportionment or to the Application of such Compensation, nor shall they be liable for the Misapplication or Nonapplication thereof.

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I. This section enables the committee to enter into a binding agreement with the promoters on behalf of the general body of commoners; and it will be the duty of the committee to apportion the compensation money, when received, among the parties entitled. This is not an easy task in many cases; and sect. 22 of the Inclosure Act, 1852, enables the committee to apply for assistance to the Inclosure Commissioners (now the Board of Agriculture). Other provisions dealing with the subject were made by sects. 15—20 of the Inclosure Act, 1854; and the Commonable Rights Compensation Act, 1882, gives further powers as to the application of the compensation money. Questions arising under this section have also been

brought before the Court in many instances to have it determined how the compensation should be distributed.

Illustrations.

(1) Land which belonged to the Corporation of Lincoln, but over which the freemen of Lincoln had rights, was taken by a railway company; and by a special Act it was enacted that after payment of costs and the appropriation of a sum for the corporation the residue of the purchase-money should be applied for the permanent benefit of the freemen. The corporation presented a petition asking for directions as to the application of the purchase-money and for a scheme for the benefit of the freemen. It was *held* that the freemen ought to be represented: *Ex parte Lincoln Corporation, In re Great Northern Ry.* (1852), 21 L. J. Ch. 621.

(2) Part of a common was taken by a railway company. Every resident freeman of the borough of Bedford had the right of turning one head of stock on to the common, and could transfer the right. It was *held* that the compensation money ought to be reinvested in land to be held on trust for the resident freemen, and in the meantime to be invested and the dividends paid to the resident freemen at the same time or times as they had been accustomed in each year to enter upon the enjoyment of their rights of common: *Nash v. Coombs* (1868), L. R. 6 Eq. 51.

(3) Waste land of the manor of Reigate was taken under the Defence Acts. Twelve of the claimants to the purchase-money were not entitled to receive more than 12*l.* between them. Each claimant was allowed three guineas for costs: *Waterton v. Burt* (1870), 39 L. J. Ch. 425.

(4) Copyholders and the owners of enfranchised copyholds within a manor were entitled to common of pasture on the waste, subject to bye-laws made by the homage, which provided (*inter alia*) that every copyholder and freeholder should be entitled to common of pasture for one head of cattle for every 10*l.* annual value of his land, provided that the whole number should not exceed thirty. Part of the land having been taken under compulsory powers, it was *held* that the purchase-money must be divided among the copyholders and the freeholders within the manor according to the stint fixed by the above-mentioned bye-law: *Fox v. Amhurst* (1875), L. R. 20 Eq. 403.

(5) Occupiers of lands under the copyholders of a manor were entitled under a bye-law to rights of common over lands of the manor, part of which were taken by a railway company. The occupiers claimed to share in the purchase-money. It was *held* that the claim failed, as it could only be made by custom, by grant, or by prescription; and there could be no custom giving a *profit à prendre in alieno solo*; there was no grant, and there could be no right by prescription, inasmuch as it was a claim in respect of the estate of the copyholders and made against the copyholders: *Austin v. Amhurst* (1877), 7 Ch. D. 689.

(6) By an award under an inclosure Act, waste land of a manor was allotted to the lord in trust for the occupiers of certain cottages to be used as a turf common. Part of the land was taken by a railway company. It was *held* that the owners of the cottages were not entitled to any part of the purchase-money; that the lord was entitled to such part as represented the value of the soil in the land taken, and that the remainder of the fund was to be held upon a charitable trust for the benefit of the occupiers of the cottages: *In re Christchurch Inclosure Act* (1888), 38 Ch. D. 520; affirmed in the House of Lords, *sub nom. Att.-Gen. v. Meyrick*, *ante*, p. 642.

(7) Land subject to rights of common was taken under statutory powers, and the money paid in consideration of the extinguished rights was lodged in court. An inquiry was

afterwards directed as to the proper mode of distribution, and a report made that distribution in equal shares appeared to be the most just. The Court made an order accordingly : *Weatherley v. Layton* [1892] W. N. 165.

II. The committee of commoners appointed to receive the compensation money paid upon the extinction of the rights of common, and, in cases of difficulty, the Board of Agriculture (as the successors of the Inclosure Commissioners), are the proper persons to determine who are the persons interested in such money and the extent of their interests; and, unless there be bias or misconduct, the Court has, it seems, no original power to interfere with the jurisdiction of either body.

Illustration.

An action against a committee of commoners by a person who claimed to be entitled as sole commoner to the whole of the compensation-money in their hands was dismissed by Kekewich, J., for want of jurisdiction, the committee being willing to discharge the duties cast upon them by the statute, and there being no suggestion that they did not intend to discharge those duties honestly and to the best of their ability, or that if any difficulties should arise they would not have recourse to the Board of Agriculture : *Richards v. De Winton*, [1901] 2 Ch. 566. This case went to the Court of Appeal ([1903] 1 Ch. 507), when the parties agreed to refer to an arbitrator the ascertainment and determination of those entitled to commonable rights in or over the lands taken and the nature and extent of their interests; and an award having been made, the Court of Appeal gave judgment in accordance therewith, without giving judgment upon the question of jurisdiction decided by Kekewich, J.

NOTE.—As to compensation for commonable lands, *see* the Commonable Rights Compensation Act, 1882 (45 & 46 Vict. c. 15), *post*.

105. If upon such Committee being appointed they shall fail to agree with the Promoters of the Undertaking as to the Amount of the Compensation to be paid as aforesaid, the same shall be determined as in other Cases of disputed Compensation.

Object of the section.

If the promoters and committee fail to agree, then the amount of compensation must be assessed by justices, by arbitration, or by a jury in the manner provided by the Act. See sects. 22—25.

106. If, upon being duly convened by the Promoters of the Undertaking, no effectual Meeting of the Parties entitled to such commonable or other Rights shall take place, or if, taking place, such Meeting fail to appoint such Committee, the Amount of such Compensation shall be determined by a Surveyor, to be

Disputes to be settled as in other Cases,

If no Committee be appointed, the Amount to be determined by a Surveyor.

appointed by two Justices, as herein-before provided in the Case of Parties who cannot be found.

Object of the section.

The compensation must be assessed by a surveyor appointed by justices, if a committee is not appointed and in the absence of any agreement under sect. 104. See sects. 58—62, as to procedure.

Upon Payment of
Compensation
payable to Com-
moners the Lands
to vest.

107. Upon Payment or Tender to such Committee, or any Three of them, or if there shall be no such Committee then upon Deposit in the Bank in the manner provided in the like Case of the Compensation which shall have been agreed upon or determined in respect of such commonable or other Rights, it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll, duly stamped in the Manner herein-before provided in the Case of the Purchase of Lands by them, and thereupon the Lands in respect of which such Compensation shall have been so paid or deposited shall vest in the Promoters of the Undertaking, freed and discharged from all such commonable or other Rights, and they shall be entitled to immediate Possession thereof; and it shall be lawful for the Court of Chancery in *England* or the Court of *Exchequer* in *Ireland* by an Order to be made upon Petition, to order Payment of the Money so deposited to a Committee to be appointed as aforesaid, or to make such other Order in respect thereto, for the Benefit of the Parties interested as it shall think fit.

NOTE.—The words in italics are repealed by the Statute Law Revision Act, 1892.

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I. Promoters are not entitled to the possession of land under this section until they have paid, tendered, or deposited the amount of the compensation.

II. Application for payment of money out of court should not now be made by petition, as directed by this section, in cases where the cash does

not exceed £1,000 or the nominal value of the securities does not exceed £1,000, but should be by summons in chambers. See Rules of Supreme Court, Ord. LV. rule 2 (2); and *In re Maidstone and Ashford Ry.* (1883), 25 Ch. D. 168, and *ante*, p. 414.

III. "Such other order." The Court will not under this section make an order giving the "parties interested" a larger interest in the money than they had in the lands, or an order handing over the whole fee simple price of the property to persons having only a temporary and fluctuating interest in it.

Illustration.

The Midland Railway purchased under the Lands Clauses Act certain commonable land over which each resident freeman of the borough of Bedford had the right of pasture for one head of stock. The resident freemen at the time of the purchase claimed to have the purchase-money divided among them. Wood, V.-C., said that under sect. 107 the Court might order payment to a committee "or might 'make such other order in respect thereto for the benefit of the parties interested as it should think fit.' That meant, according to their several rights and interests in having an investment of it, and dealing with it in that way. The committee had filed a bill for the purpose of allowing the Court to deal with the fund according to the rights and interests of the several parties, and all he could do was to take care that the money should be applied in accordance with the scheme of the Lands Clauses Act, which was according to the several interests of the parties entitled. The declaration would be that the money paid into court ought to be reinvested in land, to be held upon the same trusts as the land taken by the railway company, that is, in trust for the freemen of the borough of Bedford from time to time residing within the limits of the ancient borough; and in the meantime the same ought to be invested and the dividends paid (subject to the payment of costs) to the trustees, to be divided by them among such resident freemen at the same time or times as such freemen had been accustomed in each year to enter upon the enjoyment of the rights of common": *Nash v. Coombs* (1868), 37 L. J. Ch. 600.

IV. The costs of persons establishing in chambers their claims to share in the funds will be allowed.

Illustration.

The Secretary of State took common lands, and by agreement with the committee of commoners a sum was paid to the committee. A bill was filed by some of the commoners praying payment into court and the ascertainment of the rights of those interested. The money was paid in, and the chief clerk ascertained the shares of those entitled, but allowed no costs of proving the claims. On summons three guineas was allowed to each successful claimant: *Waterlow v. Burt* (1870), 18 W. R. 683.

Lands in Mortgage.

And with respect to Lands subject to Mortgage, be it enacted as follows:

Power to redeem
Mortgages.

108. It shall be lawful for the Promoters of the Undertaking to purchase or redeem the Interest of the Mortgagee of any such Lands which may be required for the Purposes of the Special Act, and that

whether they shall have previously purchased the Equity of Redemption of such Lands or not, and whether the Mortgagee thereof be entitled thereto in his own Right or in trust for any other Party, and whether he be in possession of such Lands by virtue of such Mortgage or not, and whether such Mortgage affect such Lands solely, or jointly with any other Lands not required for the Purposes of the Special Act, and in order thereto the Promoters of the Undertaking may pay or tender to such Mortgagee the Principal and interest due on such Mortgage, together with his Costs and Charges, if any, and also Six Months additional Interest, and thereupon such Mortgagee shall immediately convey his Interest in the Lands comprised in such Mortgage to the Promoters of the Undertaking, or as they shall direct, or the Promoters of the Undertaking may give notice in Writing to such Mortgagee that they will pay off the Principal and Interest due on such Mortgage at the End of Six Months, computed from the Day of giving such Notice; and if they shall have given any such Notice, or if the Party entitled to the Equity of Redemption of any such Lands shall have given Six Months Notice of his Intention to redeem the same, then at the Expiration of either of such Notices, or at any intermediate Period upon Payment or Tender by the Promoters of the Undertaking to the Mortgagee of the Principal Money due on such Mortgage, and the Interest which would become due at the End of Six Months from the Time of giving either of such Notices, together with his Costs and Expenses, if any, such Mortgagee shall convey or release his Interest in the Lands comprised in such mortgage to the Promoters of the Undertaking, or as they shall direct.

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I. This section provides for the redemption of mortgages on the land taken by the promoters. In addition to principal, interest and costs, mortgagees are entitled to six months' notice of the intention to redeem, or to six

months' additional interest in lieu of such notice. And if the landowner undertakes to arrange with the mortgagees he must do so.

Illustration.

Land subject to a mortgage was taken by a railway company. The existence of the mortgage was not disclosed till the abstracts of title were delivered. It was *held* that interest to the mortgagee in lieu of notice was payable by the vendors. *Per Chitty, J.* : "Sect. 108 of the Lands Clauses Act, 1845, confers the right to redeem, while it does not relieve the vendors of the duty of giving notice to the mortgagee" : *Spencer-Bell to London and South-Western Ry.* (1885), 33 W. R. 771.

II. The costs to which a mortgagee is entitled in the cases—(1) When the mortgage deed is silent as to costs, (2) When the mortgage deed provides for costs, are indicated in the following cases.

Illustrations.

(1) B., who had mortgaged lands to D. to secure a debt of 600*l.* and interest, filed a bill for redemption. In the mortgage deed it was declared that it "should be a security not only for the 600*l.* and other sums and interest as aforesaid, but also for the costs of preparing and executing the indenture, and all other costs and charges connected with any sale or sales, assignment or assignments, action or actions, suit or suits at law or in equity" necessary to the security. A decree was made that an account should be taken of what was due for principal and interest, and an account of sale money, rents and profits reserved by D. Before the chief clerk, D. claimed the costs of two actions relating to the property, which the chief clerk refused to entertain. D. appealed against the decree, seeking to vary it by inserting an inquiry whether anything and what was due to D. for costs :—*Held*, that the decree was right ; *held also*, by Selwyn, L.J., that costs properly incurred came under the head "just allowances," and by Giffard, L.J., that they were principal secured by the deed : *Blachford v. Davis* (1869), L. R. 4 Ch. 304.

(2) Leasehold property which was subject to a mortgage in favour of R. was taken by the M. Board of Works under statutory powers. The deed of mortgage contained no special provisions as to the costs which he was to be entitled to charge against the mortgaged property. After the issue of a writ by R., but before delivery of the statement of claim, the Board paid into court the sum of 900*l.*, which had been assessed as the value of the property, and paid to R. his taxed costs of the inquiry, and an order was made staying further proceedings as against the Board. R. claimed to be paid his costs of and incidental to the assessing of the compensation out of the 900*l.* in priority to all other claims :—*Held*, that R. was entitled only to the ordinary inquiry "whether anything and what was due to him for any and what costs, charges and expenses properly incurred by him in respect of his mortgage security," and that he was not entitled to an express direction for the allowance of his extra costs (beyond those allowed on taxation between himself and the Board) of the inquiry to assess the compensation : *Rees v. Metropolitan Board of Works* (1880), 14 Ch. D. 372.

III. If promoters, who have not settled with the mortgagees, enter on the land and depreciate the security by committing waste they may be restrained by injunction from proceeding with the works.

Illustration.

A railway company with notice of a mortgage treated with the mortgagor only and paid their purchase-money into court to his credit. They went into possession of the land and

began pulling down buildings. The mortgagees obtained an injunction restraining the company from proceeding until the value of their interests were ascertained and the amount paid or secured: *Ranken v. East and West India Docks Ry.* (1849), 12 Beav. 298.

IV. Promoters who ignore the rights of mortgagees to compensation do so at their peril.

Illustration.

Leasehold land subject to an equitable mortgage was taken by a railway company, who gave bonds to the landowner and to the mortgagees under the 85th section and took possession, but proceeded with the inquiry as to compensation as against the landowner only. The compensation awarded was less than the sum paid into court, and less than the amount due to the mortgagees. It was *held* that the mortgagees had no lien on the fund in court; but also that they were not bound by the inquiry to which they had not been parties, and were, in default of payment, entitled to an assignment of the land: *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501.

109. If, in either of the Cases aforesaid upon such Payment or Tender, any Mortgagee shall fail to convey or release his Interest in such Mortgage as directed by the Promoters of the Undertaking, or if he fail to adduce a good Title thereto to their Satisfaction, then it shall be lawful for the Promoters of the Undertaking to deposit in the Bank, in the Manner provided by this Act in like cases, the Principal and Interest, together with the Costs, if any, due on such Mortgage, and also, if such Payment be made before the Expiration of Six Months Notice as aforesaid, such further Interest as would at that Time become due; and it shall be lawful for them, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them; and thereupon, as well as upon such Conveyance by the Mortgagee, if any such be made, all the Estate and Interest of such Mortgagee, and of all Persons in trust for him, or for whom he may be a Trustee, in such Lands, shall vest in the Promoters of the Undertaking, and they shall be entitled to immediate Possession thereof in case such Mortgagee were himself entitled to such Possession.

Object of the section.

A mortgagee not being entitled to compensation in the ordinary sense of the word in cases where the sum due to him does not exceed the value of the lands, but only to the amount of his debt with interest and costs,

the land can be released from his security on the deposit of the sum due to him and his interest in the land vested in the promoters.

Sum to be paid
when Mortgage
exceeds the Value
of the Lands.

110. If any Mortgaged Lands shall be of less Value than the Principal, Interest, and Costs secured thereon, the Value of such Lands, or the Compensation to be made by the Promoters of the Undertaking in respect thereof, shall be settled by Agreement between the Mortgagee of such Land, and the Party entitled to the Equity of Redemption thereof on the one Part, and the Promoters of the Undertaking on the other Part, and if the Parties aforesaid fail to agree respecting the Amount of such Value or Compensation, the same shall be determined as in other Cases of disputed Compensation; and the Amount of such Value or Compensation, being so agreed upon or determined, shall be paid by the Promoters of the Undertaking to the Mortgagee in satisfaction of his Mortgage Debt so far as the same will extend, and upon Payment or Tender thereof the Mortgagee shall convey or release all his Interest in such Mortgaged Lands to the Promoters of the Undertaking, or as they shall direct.

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I. Object of the section.

This section provides for the case in which the amount due to the mortgagee exceeds the value of the land taken by the promoters. Failing agreement, the amount of the compensation must be determined in the usual way, and a notice to treat under the 18th section of the Act must be given to the mortgagees. See *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501 (*ante*, pp. 139, 652).

Illustration.

Leasehold property which was in mortgage was taken by a railway company. The mortgagor was a bankrupt, and his assignee took no steps towards claiming the equity of redemption. It was *held* that the case came under the 110th section: *R. v. Metropolitan Ry.* (1865), 13 L. T. 444.

II. A mortgage of premises on which a business is carried on carries the goodwill of the business, and a mortgagee is entitled to the amount assessed as compensation for the goodwill, except in the cases where the goodwill depends on the personal skill of the mortgagor. On the same principle a mortgagee in possession is entitled to a sum awarded for loss of profits.

Illustrations.

(1) The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as security, and brought a price less than the amount of the debt :—*Held*, that the equitable mortgagee was entitled to the whole of the purchase-money, whether arising from the value of the goodwill or from the value of the lease independently of the goodwill: *Chissum v. Dewes* (1828), 5 Russ. 29 ; 29 R. R. 10.

(2) In July, 1866, H., a baker, mortgaged his leasehold shop, together with other property, to K. for the purpose of securing the final balance of an open account between him and K., in respect of which a balance more than 500*l.* was due to K. at the time when a notice to treat was served upon H. by a railway company. After negotiations H. agreed to sell his property, including goodwill, to the company for 500*l.* Upon preparation of the assignment of the leasehold premises and submission of the draft to K.'s solicitor, objection was made to the payment of the purchase-money to the mortgagor :—*Held*, that the goodwill of the business was incident to the house, and that K. was entitled to the purchase-money: *King v. Midland Ry.* (1868), 17 W. R. 113.

(3) A graving dock, with its machinery and fixtures, was mortgaged, and after notice to take part of the property had been given by a railway company, but before the amount of compensation was ascertained, the mortgagees went into possession. A sum of 11,950*l.* was awarded as compensation, of which 2,800*l.* was awarded in respect of loss of profits in carrying on the business. It was *held* that the 2,800*l.* was in the nature of compensation for the value of the goodwill of the business which passed with the property, and that the whole sum of 11,950*l.* was payable to the mortgagees: *Pile v. Pile, Ex parte Lambton* (1876), 3 Ch. D. 36.

(4) The M. Board of Works took a leasehold house occupied by a tailor, who had mortgaged the leasehold interest. Compensation was agreed at 400*l.*, of which 150*l.* was to be for the lease, and 250*l.* for trade damage and personal expenses. A title to the leasehold could not be made, and the 400*l.* having been paid into court, the tailor was *held* entitled to receive the 250*l.* at once, the doctrine that the goodwill of trade premises passes to a mortgagee not applying to the case where the goodwill depends on the personal skill of the mortgagor: *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472.

III. An apportionment of the compensation may be made when necessary among the parties interested.

Illustration.

A leasehold hotel was settled upon A. for life, with remainder to B. B. mortgaged his reversion, and the property was taken under compulsory powers. The compensation money was apportioned between tenant for life, remainderman and mortgagee, allowance being made to the tenant for life, who was the occupier of the hotel, for trade disturbance: *In re South City Market, Ex parte Bergin* (1884), 13 L. R. Ir. 245.

Deposit of Money
when refused on
Tender.

111. If upon such Payment or Tender as aforesaid being made, any such Mortgagee fail so to convey his Interest in such Mortgage, or to adduce a good Title thereto to the Satisfaction of the Promoters of the Undertaking, it shall be lawful for them to deposit the Amount of such Value or Compensation in the Bank, in the Manner provided by this Act in like Cases, and every such Payment or Deposit shall be accepted by the Mortgagee in satisfaction of his Mortgage Debt, so far as the same will extend, and shall be a full Discharge of such mortgaged Lands from all Money due thereon; and it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them; and thereupon such Lands, as to all such Estate and Interest as were then vested in the Mortgagee, or any Person in trust for him, shall become absolutely vested in the Promoters of the Undertaking, and they shall be entitled to immediate Possession thereof in case such Mortgagee were himself entitled to such Possession; nevertheless, all Rights and Remedies possessed by the Mortgagee against the Mortgagor, by virtue of any Bond or Covenant or other Obligation, other than the Right to such Lands, shall remain in force in respect of so much of the Mortgage Debt as shall not have been satisfied by such Payment or Deposit.

Object of the section.

This section provides for the vesting of the lands in the promoters free from mortgages (in cases where the amount due on the mortgages exceeds the value of the lands) on the deposit of the amount assessed for compensation in the bank. The rights of mortgagees remain in force, except as against the lands taken, for the recovery of so much of the mortgage debt as is not covered by the amount of the compensation for the lands taken.

Sum to be
paid where part
only of mort-
gaged lands
taken.

112. If a Part only of any such mortgaged Lands be required for the Purposes of the Special Act, and if the Part so required be of less value than the Principal Money, Interest, and Costs secured on such Lands, and the Mortgagee shall

not consider the remaining Part of such Lands a sufficient Security for the Money charged thereon, or be not willing to release the Part so required, then the Value of such Part, and also the Compensation (if any) to be paid in respect of the Severance thereof or otherwise, shall be settled by Agreement between the Mortgagee and the Party entitled to the Equity of Redemption of such Land on the one Part, and the Promoters of the Undertaking on the other, and if the Parties aforesaid fail to agree respecting the Amount of such Value or Compensation the same shall be determined as in other Cases of disputed Compensation; and the Amount of such Value or Compensation, being so agreed upon or determined, shall be paid by the Promoters of the Undertaking to such Mortgagee in satisfaction of his Mortgage Debt, so far as the same will extend; and thereupon such Mortgagee shall convey or release to them, or as they shall direct, all his Interest in such mortgaged Lands the Value whereof shall have been so paid; and a Memorandum of what shall have been so paid shall be endorsed on the Deed creating such Mortgage, and shall be signed by the Mortgagee; and a Copy of such Memorandum shall at the same Time (if required) be furnished by the Promoters of the Undertaking, at their Expense, to the Party entitled to the Equity of Redemption of the Lands comprised in such Mortgage Deed.

Object of the section.

This section deals with the case where part only of the lands in mortgage is taken by the promoters.

In default of agreement, where the part taken is of less value than the amount due on the mortgage and the part not taken is not a sufficient security for such amount, the value of the land taken and the amount of compensation for severance must be determined in the usual way, and the mortgagee will receive the same in satisfaction pro tanto of his mortgage debt, a memorandum of the amount so received by him being indorsed on the mortgage deed.

Deposit of Money
when refused on
Tender.

113. If, upon Payment or Tender to any such Mortgagee of the Amount of the Value or Compensation so agreed upon or determined, such Mortgagee shall fail to convey or release to the Promoters of

the Undertaking, or as they shall direct, his Interest in the Lands in respect of which such Compensation shall so have been paid or tendered, or if he shall fail to adduce a good Title thereto to the Satisfaction of the Promoters of the Undertaking, it shall be lawful for the Promoters of the Undertaking to pay the Amount of such Value or Compensation into the Bank, in the Manner provided by this Act in the Case of Monies required to be deposited in such Bank, and such Payment or Deposit shall be accepted by such Mortgagee in satisfaction of his Mortgage Debt, so far as the same will extend, and shall be a full Discharge of the Portion of the mortgaged Lands so required from all Money due thereon; and it shall be lawful for the Promoters of the Undertaking, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them; and thereupon such Lands shall become absolutely vested in the Promoters of the Undertaking, as to all such Estate and Interest as were then vested in the Mortgagee, or any Person in trust for him, and in case such Mortgagee were himself entitled to such Possession they shall be entitled to immediate Possession thereof; nevertheless, every such Mortgagee shall have the same Powers and Remedies for recovering or compelling Payment of the Mortgage Money, or the Residue thereof (as the Case may be), and the Interest thereof respectively, upon and out of the Residue of such Mortgaged Lands, or the Portion thereof not required for the Purposes of the Special Act, as he would otherwise have had or been entitled to for recovering or compelling Payment thereof upon or out of the whole of the Lands originally comprised in such Mortgage.

Object of the section.

This section provides, on the failure of the mortgagee to convey or adduce a good title, for the vesting of the lands in the promoters, free from mortgages by the deposit in the bank of the amount assessed. The rights of the mortgagees remain in force except as against the lands so taken.

If promoters pay the entire value of the lands into court they will be liable for the costs of subsequent dealings with the fund.

Illustration.

Parts of settled estates subject to mortgages were taken by a company, some of the mortgages having been created before and some after the date of the purchase. The purchase-money was paid into court and invested, and the tenant for life petitioned for a reinvestment in land. The money was ordered to be reinvested in lands to be conveyed to the uses of the settlement and to be subject to the existing mortgages; and it was *held* that all the incumbrancers were entitled to notice of such reinvestment, and that the railway company was liable to the entire costs and expenses of and incidental to the same: *Ex parte Peyton's Settlement, In re Eastern Counties Ry.* (1856), 4 W. R. 380. It was argued in this case that to bind the equity of redemption it was necessary to bring the money into court, and by sect. 113 of the Lands Clauses Act the payment into court was to be accepted by the mortgagee in satisfaction of his debt so far as that was concerned. Stuart, V.-C., said: "You are too late to pay this money to the mortgagees. You might have compelled them to take it by paying it into court. The privileges conferred upon railway companies by the 108th and following sections are too often overlooked by them."

Compensation to be made in certain Cases if Mortgage paid off before the stipulated Time.

114. Provided always, That in any of the Cases herein-before provided with respect to Lands subject to Mortgage, if in the Mortgage Deed a Time shall have been limited for Payment of the Principal Money thereby secured, and under the Provisions herein-before contained the Mortgagee shall have been required to accept Payment of his Mortgage Money, or of Part thereof, at a Time earlier than the Time so limited, the Promoters of the Undertaking shall pay to such Mortgagee, in addition to the Sum which shall have been so paid off, all such Costs and Expenses as shall be incurred by such Mortgagee in respect of or which shall be incidental to the Re-investment of the Sum so paid off, such Costs in case of Difference to be taxed and Payment thereof enforced in the Manner herein provided with respect to the Costs of Conveyances; and if the Rate of Interest secured by such Mortgage be higher than at the Time of the same being so paid off can reasonably be expected to be obtained on re-investing the same, regard being had to the then current Rate of Interest, such Mortgagee shall be entitled to receive from the Promoters of the Undertaking, in addition to the Principal and Interest herein-before provided for, Compensation in respect of the Loss to be sustained by him by reason of his Mortgage Money being so prematurely paid off, the Amount of such Compensation to be ascertained, in case of difference, as in other Cases of disputed Compensation; and until Payment or Tender of such Compensation

as aforesaid the Promoters of the Undertaking shall not be entitled, as against such Mortgagee, to Possession of the mortgaged Lands under the Provision herein-before contained.

Object of the section.

Mortgage deeds sometimes contain a proviso that the mortgagor shall not be at liberty to pay off the loan for a term certain. In such a case the mortgagee is prejudiced if the loan has to be paid off before the expiration of the term.

This section provides that if the mortgagee is paid off under the Act before the expiration of the term, he is entitled to receive, in addition to the sum paid—(a) the costs of reinvestment; and (b), if reinvestment results in a reduction of the rate of interest, compensation in respect of the loss so sustained.

Illustration.

The plaintiffs were the mortgagees of certain lands, and were not bound to receive the mortgage money until a future date. The railway company, with knowledge of the mortgage, treated with the mortgagor alone, but, failing to agree with him, paid the estimated amount of compensation into court to the credit of the mortgagor, providing nothing for the expense of reinvestment, nothing for mortgagee's costs, and nothing for any compensation in respect of the difference of interest. The company took possession and began to demolish the buildings on the land. Upon motion, it was *held* that the company had wrongfully taken possession of the lands, and an injunction was granted restraining the company from proceeding with the works of the railway until the value of the mortgagees' interest had been determined and paid or secured: *Ranken v. East and West India Docks Ry.* (1849), 12 Beav. 298. "I am clearly of opinion that this possession was wrongfully taken, and I think I shall not be acting contrary to what this Court has done in previous cases if I grant an injunction to prevent the company from dealing with the land, as they intended to do for their own purposes": *per* Lord Langdale, at p. 305, *ib.*

Rentcharges.

And with respect to Lands charged with any Rent Service, Rentcharge, or chief or other Rent, or other Payment or Incumbrance not herein-before provided for, be it enacted as follows:

115. If any Difference shall arise between the Promoters of the Undertaking and the Party entitled to any such Charge upon any Lands required to be taken for the Purposes of the Special Act, respecting the Consideration to be paid for the Release of such Lands therefrom, or from the Portion thereof affecting the Lands required for the Purposes of the Special Act, the

Release of Lands
from Rent-
Charges.

same shall be determined as in other Cases of disputed Compensation.

Object of the section.

This section provides for the release of the lands taken from "any rent service, rentcharge or chief or other rent or other payment or incumbrance" not provided for by the preceding sections. In default of agreement the compensation must be determined as in other cases under the Act.

The committee of a lunatic, with the sanction of the Court, can release lands charged with any such annual rent or payment as is mentioned in this section.

Illustration.

Freehold houses charged with the payment of an annuity for the benefit of a lunatic were taken by promoters, to whom they were conveyed subject to the annuity. The promoters offered to purchase a Government annuity of the same amount for the life of the lunatic. Upon such annuity being purchased, the Court authorised the committee of the lunatic to release the houses from the charge: *In re Brewer* (1875), 1 Ch. D. 409.

116. If Part only of the Lands charged with any such Rent Service, Rentcharge, chief or other Rent, Payment, or Incumbrance, be required to be taken for the Purposes of the Special Act, the Apportionment of any such Charge may be settled by Agreement between the Party entitled to such Charge and the Owner of the Lands on the one Part, and the Promoters of the Undertaking on the other Part, and if such Apportionment be not so settled by Agreement the same shall be settled by Two Justices; but if the remaining Part of the Lands so jointly subject be a sufficient Security for such Charge, then, with Consent of the Owner of the Lands so jointly subject, it shall be lawful for the Party entitled to such Charge to release therefrom the Lands required, on condition or in consideration of such other Lands remaining exclusively subject to the whole thereof.

Deposit in case of
Refusal to release.

117. Upon Payment or Tender of the Compensation so agreed upon or determined to the Party entitled to any such Charge as aforesaid, such Party shall execute to the Promoters of the Undertaking a Release of such Charge; and if he fail so to do, or if he

fail to adduce good Title to such Charge to the Satisfaction of the Promoters of the Undertaking, it shall be lawful for them to deposit the Amount of such Compensation in the Bank in the Manner hereinbefore provided in like Cases, and also, if they think fit, to execute a Deed Poll, duly stamped, in the Manner herein-before provided in the Case of the Purchase of Lands by them, and thereupon the Rent Service, Rentcharge, chief or other Rent, Payment, or Incumbrance, or the Portion thereof in respect whereof such Compensation shall so have been paid, shall cease and be extinguished.

Object of sects. 116 and 117.

Where part only of the lands charged with any rent service, &c., is taken, the apportionment of the charge or incumbrance may be settled by agreement, or in default must be settled by two justices; or with the consent of the owner of the lands the part not taken, if of sufficient value, may be made subject to the entirety of the charge or incumbrance to the exclusion of the part taken.

Illustration.

A railway company agreed to purchase for 1,700*l.* three and a half acres, part of an estate of 122 acres, charged with an annuity of 20*l.* per annum. In a suit for specific performance a reference was directed as to the title, and if a good title was found in other respects an inquiry as to the amount of compensation to be allowed against the rent-charge, the total value of which was assessed at 500*l.* :—*Held*, that 12*l.* 14*s.* 8*d.*, being the proportional part of the value of the rent-charge, was a proper deduction from the price; and the vendor was ordered to covenant to pay the annuity, and that as between himself and the company it should be charged on the remainder of the estate, in exoneration of the three and a half acres : *Powell v. South Wales Ry.* (1855), 1 Jur. (N.S.) 773.

NOTE.—In default of a release of the charge by the party entitled to it upon payment or tender of the compensation to him, the amount may be deposited in the bank, and the promoters may execute a deed poll releasing the lands taken from the charge.

Charge to continue on Lands not taken.

118. If any of such Lands be so released from any such Charge or Incumbrance, or Portion thereof, to which they were subject jointly with other Lands, such last-mentioned Lands shall alone be charged with the whole of such Charge, or with the Remainder thereof, as the Case may be, and the Party entitled to the Charge shall have all the same Rights and Remedies over such last-mentioned Lands, for the whole or

for the Remainder of the Charge, as the Case may be, as he had previously over the whole of the Lands subject to such Charge; and if upon any such Charge or Portion of Charge being so released the Deed or Instrument creating or transferring such Charge be tendered to the Promoters of the Undertaking for the Purpose, they or Two of them shall subscribe, or if they be a Corporation shall affix their Common Seal to a Memorandum of such Release endorsed on such Deed or Instrument, declaring what Part of the Lands originally subject to such Charge shall have been purchased by virtue of the Special Act, and if the Lands be released from Part of such Charge, what Proportion of such Charge shall have been released, and how much thereof continues payable, or if the Lands so required shall have been released from the whole of such Charge, then that the remaining Lands are thenceforward to remain exclusively charged therewith; and such Memorandum shall be made and executed at the Expense of the Promoters of the Undertaking, and shall be evidence in all Courts and elsewhere of the Facts therein stated, but not so as to exclude any other Evidence of the same Facts.

Object of the section.

This section provides for the continuance of the charge or incumbrance on the lands not taken, and for the preservation of the rights of enforcing the charge on such lands, and for a record of the transaction by an indorsement of the particulars on the deed or instrument creating the charge.

Leases.

And with respect to Lands subject to Leases, be it enacted as follows :

119. If any Lands shall be comprised in a Lease, for a Term of Years unexpired, Part only of which Lands shall be required for the Purposes of the Special Act, the Rent payable in respect of the Lands comprised in such lease shall be apportioned between the Lands so required and the

Where Part only of Lands under Lease taken, the Rent to be apportioned.

Residue of such Lands ; and such Apportionment may be settled by agreement between the Lessor and Lessee of such Lands on the One Part, and the Promoters of the Undertaking on the other Part, and if such Apportionment be not so settled by Agreement between the Parties, such Apportionment shall be settled by Two Justices ; and after such Apportionment the Lessee of such Lands shall, as to all future accruing Rent, be liable only to so much of the Rent as shall be so apportioned in respect of the Lands not required for the Purposes of the Special Act ; and as to the Lands not so required, and as against the Lessee, the Lessor shall have all the same Rights and Remedies for the Recovery of such Portion of Rent as previously to such Apportionment he had for the Recovery of the whole Rent reserved by such Lease ; and all the Covenants, Conditions, and Agreements of such Lease, except as to the Amount of Rent to be paid, shall remain in force with regard to that Part of the Land which shall not be required for the Purposes of the Special Act, in the same Manner as they would have done in case such Part only of the Land had been included in the Lease.

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I. This section provides for the apportionment of rent where part only of lands subject to leases is taken by the promoters. In such a case in default of agreement between the lessor and the lessee on the one part, and the promoters of the undertaking on the other part, the apportionment must be settled by two justices. An arbitrator appointed to determine the amount of compensation payable to the lessee cannot settle the apportionment, since the lessor is no party to such arbitration.

Illustration.

Where one entire rent extends over the land taken and that not taken by the promoters, an arbitrator appointed under the Lands Clauses Act has no power to apportion the rent, but the apportionment must be effected under this section : *Ware v. Regent's Canal*

(1854), 7 Rail. Cas. 780. "The third objection is that the arbitrator had not apportioned the rent of the leasehold land, or determined upon what portion of the property the rent should remain charged. The answer to this is, that he had no power whatever to do so; for the landlords of Mr. Ware, the warden and fellows of All Souls' College, were no party to the submission, and of course no apportionment of rent by the arbitrator would be binding upon them. But it is quite clear that the apportionment of the rent under such circumstances is not within the authority of the arbitrator at all, but it is to be effected under the provisions contained in the 119th section of the Lands Clauses Act": *per* Pollock, C.B., at p. 786, *ib.*

II. The jurisdiction under this section arises in default of agreement between lessor and lessee on the one part and the promoters on the other.

Illustrations.

(1) Part of the land comprised in a lease was taken by a railway company. The company objected to complete on the ground that the lessor's consent to the apportionment of the rent had not been obtained. It was *held*, in a suit for specific performance, that it was not necessary for the lessee to procure the lessor's consent, and that he had no power to do so: *Slipper v. Tottenham and Hampstead Junction Ry.* (1867), L. R. 4 Eq. 112.

(2) An agreement for the sale of leaseholds to a railway company contained a stipulation that the rents should be apportioned according to the provisions of the Lands Clauses Act. The lessor refused to agree to any apportionment, and the company refused to serve him with notice to treat. The Court decreed specific performance of the contract, and directed that plaintiff and defendant should do and concur in all acts necessary to give effect to it: *Williams v. East London Ry.* (1869), 18 W. R. 159.

III. The apportioned rent becomes payable from the date when the apportionment is made, whether by agreement or by the order of justices.

Illustrations.

(1) A portion of lands held under leases was taken by a railway company under the Railways (Ireland) Act, 1860, and the rent was apportioned by an arbitrator. It was *held* that the apportioned rent only was payable to the landlord from the date of the final award, although no conveyance was executed to the company nor land taken by them till after the accrual of subsequent gales of rent: *Ball v. Graves* (1886), 18 L. R. Ir. 224.

(2) A portion of lands in the occupation of a statutory tenant was required by the Secretary of State for War for the purposes of the Defence Act. Notice to treat was given, and the rent was apportioned by agreement, as provided by sect. 119:—*Held*, that the apportioned rent only was payable from the date of the agreement, although no entry had taken place: *In re Secretary of State for War and Hurley's Contract*, [1904] 1 I. R. 354. "I am therefore of opinion that the time from which the apportioned rent is payable runs from the date when the apportionment is made, whether by agreement between the parties or by the order of two justices": *per* Porter, M.R., at p. 360, *ib.*

IV. The lessor cannot claim arrears of rent out of compensation money paid to tenants, although this section keeps alive his remedies for the recovery of the rent apportioned.

Illustration.

Two hundred pounds was lodged in the Bank of Ireland by a railway company as compensation for tenants whose lands it had taken. Arrears of rent were due to the landlord from the tenants in respect of the lands. It was *held* that he had no claim to have the arrears satisfied out of the compensation money : *Ex parte Carey, In re Great Southern and Western Ry.* (1847), 10 L. T. (O.S.) 37.

V. The costs of a lessor incurred in apportioning rents under this section are within sect. 80 as costs incurred in consequence of the taking of the lands, but are not costs of conveyance within sect. 82.

(See *Ex parte Buck, In re Hampstead Junction Ry.* (1863), 33 L. J. Ch. 79; *Ex parte Flower, In re London, Brighton and South Coast Ry.* (1866), L. R. 1 Ch. 599, under sect. 80, *ante*, p. 507.)

Illustration.

"The vice-chancellor was right, in point of principle, precedent, propriety, and substantial justice, in ordering the company to pay these costs, unless it can be shown that under the Act of Parliament he had no jurisdiction to do so": *per* Knight Bruce, L.J., in *Ex parte Flower* at p. 602. "But it was urged that the section did not apply at all, because the money was not deposited in court under the prior sections, but under sect. 85. I am, however, clearly of opinion that the 80th section applies whether the money is deposited under the earlier or the subsequent clauses": *per* Turner, L.J., in *Ex parte Flower* at p. 603.

120. Every such Lessee as last aforesaid shall be entitled to receive from the Promoters of the Undertaking Compensation for the Damage done to him in his Tenancy by reason of the Severance of the Lands required from those not required, or otherwise by reason of the Execution of the Works.

This section enables lessees, part only of whose lands has been taken by promoters, to recover compensation for severance or otherwise by reason of the execution of the works as provided by the 63rd section.

121. If any such Lands shall be in the Possession of any Person having no greater Interest therein than as Tenant for a Year or from Year to Year, and if such Person be required to give up Possession of any Lands so occupied by him before the Expiration of his Term or Interest therein, he shall be entitled to Compensation for the Value of his unexpired Term or Interest in such Lands, and for any just Allowance which ought to be made to him by an in-coming Tenant,

Tenants to be compensated.

Compensation to be made to Tenants at Will, &c.

and for any Loss or Injury he may sustain, or if a Part only of such Lands be required, Compensation for the Damage done to him in his Tenancy by severing the Lands held by him, or otherwise injuriously affecting the same; and the Amount of such Compensation shall be determined by Two Justices, in case the Parties differ about the same; and upon Payment or Tender of the Amount of such Compensation all such Persons shall respectively deliver up to the Promoters of the Undertaking, or to the Person appointed by them to take possession thereof, any such Lands in their Possession required for the Purposes of the Special Act.

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I. The object of the section and its effect.

Illustrations.

(1) "The 121st section of the Lands Clauses Consolidation Act, 1845, comes by way of proviso, taking out of the previous general enactment providing for everything a particular branch for which it makes a particular provision": *R. v. London Corporation* (1867), L. R. 2 Q. B. 292.

(2) "The object of this enactment was to prevent claims arising out of interests of short duration from being heard by any tribunal other than that of justices. The Legislature thought that claims of this kind, being from their nature of comparatively small amounts, need not go before either a jury or arbitrators, and that they might be satisfactorily and cheaply disposed of before justices": *per Mellor, J.*, in *R. v. Great Northern Ry.* (1876), 2 Q. B. D. at p. 156.

II. Tenancies within sect. 121.

(a) The section applies to all tenancies in which the tenant's interest at the time when possession is required or taken has less than a year to run, or is only that of a tenant from year to year; and unless the interest in the land taken is greater than that of a tenant from year to year, the tenant will not be entitled to compensation under sect. 68.

Illustrations.

(1) A local and personal Act provided that the purchase and compensation moneys with respect to lands taken should be assessed, in case of disagreement, by a jury, who should assess the compensation payable to owners and occupiers; and every tenant at will, lessee for a year, and other person in possession of lands through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice, but when such tenant was required to give up possession before the expiration of his term or interest, the company was to make compensation for the value of the unexpired term, if any. The company gave notice to a person whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the company and died:—*Held*, that the tenant had no interest for which the company was bound to make compensation under the Act: *R. v. Liverpool and Manchester Ry.* (1836), 4 A. & E. 650; 43 R. R. 454.

(2) See *Ex parte Nadin* (1848), 17 L. J. Ch. 421; and *post*, p. 669.

(3) The master of the G. Grammar School held office on the terms that he might be removed on June 21st or December 21st in any year on receiving three months' notice in writing from two-thirds of the governors. It was *held* that he had no greater interest in the school-house which he occupied as master than as tenant for a year or from year to year: *R. v. Manchester, Sheffield and Lincolnshire Ry.* (1854), 4 El. & Bl. 88.

(4) A person having no greater interest than that of a tenant from year to year claimed compensation under sect. 68 of the Lands Clauses Act in respect of land taken. It was *held* that he ought to have proceeded under sect. 121: *Knapp v. London, Chatham and Dover Ry.* (1863), 32 L. J. Ex. 236.

(5) The Corporation of London gave notice under a special Act of their intention to take a house, subject to a tenancy, of which more than a year at the date of the notice, but less than a year at the expiration of the notice, remained unexpired. The tenant was *held* entitled to have compensation assessed by a jury: *Tyson v. London Corporation* (1871), L. R. 7 C. P. 18.

(6) W. agreed in writing, but not under seal, to let to B. a house as tenant from year to year and to let B. remain as tenant "as long as he keeps the rent paid and W. has power to let," and not to increase the rent. B. agreed to purchase beer exclusively from W. W. gave B. notice to quit, and died during the currency of the notice. The rent reserved was less than two-thirds of the annual value of the premises:—*Held*, that the only interest of B. was a tenancy from year to year: *Wood v. Beard* (1876), 2 Ex. D. 30.

(7) A. on August 14th, 1871, by an agreement in writing let land to B. for one year and agreed that if B. wished to continue the tenancy for a further two years, A. would guarantee to let him have the premises. In December, 1871, the G. Railway

Co. served on B. notice of their intention to apply for an Act, which became law in 1872 and incorporated the Lands Clauses Act. On August 1st, 1872, B. told A. that he wished to continue the tenancy for two years. B. paid the rent up to August 10th, 1873. On March 21st, 1873, the company handed to A. a notice to treat addressed to B. This notice never reached B. On August 13th, 1873, the company entered on the land. B. claimed compensation under sect. 68 :—*Held*, that at the time of entry B. had no greater interest than as a tenant for a year or from year to year, and that he should have taken proceedings before two justices under sect. 121 : *R. v. Great Northern Ry.* (1876), 2 Q. B. D. 151.

(8) A man agreed to take a theatre for eight weeks to commence on a future day. Promoters of an undertaking under statutory powers made excavations whereby the theatre became unsafe and had to be closed during the eight weeks. The intending lessee was *held* to have sufficient interest in the form of an *interesse termini* to enable him to maintain an action for damages : *Gillard v. Cheshire Lines Committee* (1884), 32 W. R. 943 ; distinguished in *Wallis v. Hands*, [1893] 2 Ch. 75, in which case Chitty, J., pointed out that the judgment in *Gillard v. Cheshire Lines Committee* turned on the proposition that the defendants had injured the plaintiff's proprietary right.

(b) Joint occupation of two adjoining houses by two persons under separate leases by different lessors may have the effect of giving the joint tenants an interest greater than that of tenants from year to year.

Illustration.

Adjoining houses were occupied by two persons under separate leases from different lessors. A notice to treat having been served on them, they claimed (*inter alia*) in respect of a joint interest in both houses as being occupied by them jointly for the purpose of carrying on a business in partnership. It was *held* that the joint occupation gave the partners an interest greater than that of tenants from year to year : *R. v. East London Ry., Ex parte Barnes* (1867), 17 L. T. 291.

(c) An agreement for a lease, although void at law, if it is equivalent in equity to a lease for a term of years (with more than a year unexpired), prevents the operation of sect. 121 with respect to the tenant's interests.

Illustrations.

(1) A tenant held under an agreement which, although void at law, was good in equity as a lease, and, upon notice to treat, calculated his interest as if he held the premises under a lease. The company, however, attempted to treat him as a yearly tenant only :—*Held*, that the view taken by the company was wrong, as the tenant had an interest greater than a yearly tenancy : *Sweetman v. Metropolitan Ry.* (1864), 1 H. & M. 543.

(2) An agreement to let land—in which no term was specified—was made determinable on six months' notice to quit on either side, and there was a further provision that if the tenants erected any buildings on the land they were to have the privilege of removing them at any time during their occupation, or otherwise they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of buildings, "such beneficial interest to extend over twenty years from the date hereof, that is to say, if the tenants are required by the landlord to give up possession of the land before the expiration of the said term of twenty years, they are to be allowed one-twentieth part of the amount expended as aforesaid for each remaining year of the unexpired term of twenty years" :—

Held, that under this agreement the tenants had such an interest in the land as to constitute them "owners" within the meaning of the Lands Clauses Act, 1845, and that therefore a company could not enter upon the land as against the tenants without having first compensated them for their interest as provided by sect. 84 of the Lands Clauses Act : *Rogers v. Hull Dock* (1864), 11 L. T. 42, 463.

(3) By an agreement in writing a lessor agreed to let to a lessee certain premises at a rent payable quarterly, and not to raise the rent or give the lessee notice to quit so long as he continued to pay the rent when due. There was also a verbal agreement that the lessee might remain in the premises for such term of years as he might desire to continue tenant. A railway company having contracted to purchase the lessee's interest, it was *held* that the lessee was not a mere tenant from year to year : *In re King, Ex parte East London Ry.* (1873), L. R. 16 Eq. 521.

NOTE.—The Court has, when necessary, directed a reference as to whether or not there is a valid agreement for a lease : *Norfolk Ry. v. Bayes* (1849), 13 Jur. 435.

III. When tenants within sect. 121 are not entitled to compensation at all.

A tenant will not be entitled to compensation if he holds under a tenancy which is determined by regular notice to quit expiring before possession is required.

Illustrations.

(1) On January 10th the L. and S. Railway gave F. six months' notice (as required by the special Act in the case of tenants from year to year), F.'s holding beginning at Christmas. The notice was given under the erroneous impression that F. held from Michaelmas. On discovering this error, notice was given that the premises would not be wanted until Christmas. F. did not quit in July, nor at Christmas :—*Held* that, the tenant having been informed that he might hold the premises until the end of the current year, and having chosen to do so, the situation of the parties was the same as if a regular landlord's notice had been given at first, and the tenant was entitled to no compensation, as he had voluntarily retained possession : *R. v. London and Southampton Ry.* (1839), 10 A. & E. 3 ; 50 R. R. 306 ; commented on in *Cranwell v. London Corporation* (1870), L. R. 5 Ex. 284, where it was pointed out that in *R. v. London and Southampton Ry.* it appeared that before the tenant went out a transaction took place between the parties, which led the Court to the conclusion that the tenant had accepted an equivalent or satisfaction for the disturbance of his possession, or that something had passed between them which disentitled the tenant to demand damages by way of compensation. "We cannot think that the Act of Parliament requires two notices in the case of a tenancy from year to year : but the true construction is, that the company might either give the ordinary landlord's notice, ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the Act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up" : *per Denman, C.J.*, in *R. v. London and Southampton Ry.* (1839), 10 A. & E. at p. 10.

(2) A freeholder agreed to sell a house and land, which were in the occupation of a yearly tenant, to the Corporation of M. He gave notice to quit to the tenant, who, however, did not give up possession on the expiration of the notice, but claimed to be entitled to a share in the purchase-money as a compensation for his interest. The claim failed, as the only ground for it was his holding over, which was wrongful : *Ex parte Nadin* (1848), 17 L. J. Ch. 421.

(3) A tenant from year to year received notice to quit from his landlord in order that a railway company might have possession. The company did not require or take possession

till the expiration of the notice to quit. It was *held* that, although the tenant had received from the company a notice under the 18th section of the Lands Clauses Act, he was not entitled to compensation : *Ex parte Merrett* (1860), 2 L. T. 471.

(4) Promoters purchased a house, and gave a quarterly tenant notice to quit. He contended that he was entitled to notice to treat under the 18th section, and that compensation should have been paid or deposited for his interest in the premises. It was *held*, that he was not so entitled, as the promoters were merely exercising their right as reversioners : *Syers v. Metropolitan Board of Works* (1877), 36 L. T. 277.

(5) A railway company purchased, through R., a dwelling-house and shop intending to use it as part of the site for a station. Until they were wanted the premises were let to L. through R., on a written agreement, on a weekly tenancy determinable at any time by a week's notice being given by either party. At the same time R. handed to the defendants the following memorandum :—"Messrs. Lewis & Co. You may have the premises as per agreement until the railway company require to pull them down." L. took possession, and the company, who required the premises, but had no present intention to pull them down, gave L. a week's notice to quit, and after the notice had expired brought ejectment. L. counter-claimed for a declaration that the representation by R. was binding on the company, and also asked for an injunction restraining them from acting upon the notice, or determining the tenancy, until they required the premises for pulling them down :—*Held*, that the plaintiff company was entitled to eject, and that the defendants were not entitled to any of the relief claimed : *Cheshire Lines Committee v. Lewis* (1880), 50 L. J. Q. B. 121.

NOTE.—The foregoing illustrations should be compared with the following case :—

Illustration to Note.

The plaintiff was a lessee of premises held of a canal company for an unexpired term of nineteen years, subject to be determined on his receiving from the lessors six months' notice and two years' reserved rent. By an agreement between the promoters of a railway company, the canal company, and the plaintiff and others as their lessees, it was agreed that if the canal company and their lessees did not oppose the railway company's Bill the railway company should, in case they purchased from the canal company any hereditaments then under lease for any unexpired term of years, purchase the same without prejudice to any such lease, and the price should be ascertained accordingly. It was further agreed that in case any of the lessees should be applied to by the railway company to treat for any part of the premises then held under leases, or if they should give notice to the railway company of their desire to sell the premises, they should accept and be entitled to receive compensation for the nature of their respective leasehold interests and for damages sustained by them in the execution of the Act. The plaintiff and the others withheld their opposition to the Bill, which passed into an Act. The railway company purchased from the canal company the whole of their canal and premises. The plaintiff gave a notice to the railway company requiring them to purchase his leasehold interest, and claiming compensation for damages. The railway company, tendering to the plaintiff two years' reserved rent, gave a counter-notice to determine the tenancy at the end of six months, at the expiration of which they brought an ejectment. The plaintiff obtained the common injunction on default of an answer to restrain the company from proceeding in the ejectment :—*Held*, that by the notice given by the plaintiff, the plaintiff and the railway company were immediately placed in the relative situations of vendor and purchaser, and that the company could not eject the plaintiff until they had paid him the purchase-money in respect of such interest in the premises as then belonged to him : *Doo v. London and Croydon Ry.* (1839), 1 Rail. Cas. 257.

IV. Notice to treat is not necessary and is not equivalent to a notice requiring possession within sect. 121.

(a) A tenant from year to year will not be entitled to compensation for loss of profits caused by the execution of the works for the period he carries on business after the date fixed for him to give up possession to the company.

Illustration.

A railway company served on a tenant from year to year of business premises a notice to treat and a notice of their intention to take possession in six months under their special Act. The tenant sent in particulars of claim, and the whole matter stood over for two years. The tenant then claimed compensation, not only for the value of his interest, but also in respect of loss of profits during the two years owing to the works of the railway in the neighbourhood. It was *held* that this loss was caused by his own act in carrying on the business after the expiration of the six months, whereas he might have insisted on the company proceeding with the purchase at the end of that time: *R. v. Vaughan* (1868), L. R. 4 Q. B. 190.

(b) If no notice to treat is given, or if, notice to treat having been given, no proceedings are taken under it, the tenant's interest must be ascertained under sect. 121 as at the date when the promoters take possession.

Illustrations.

(1) The prosecutors were tenants of land for two years. The defendant company, desiring to take the land, after serving notices in an irregular manner (so that neither the prosecutors nor the company were bound by such notices) entered upon the land when the unexpired residue of the prosecutors' term amounted to one year less three days. Upon proceedings to compel the company to take up an award obtained by the prosecutors in an arbitration under sect. 68 :—*Held*, that the prosecutors were persons "having no greater interest . . . than as a tenant for a year or from year to year," and that they should have proceeded under sect. 121. "The proper date for ascertaining the rights of the prosecutors and defendants is . . . when the latter entered upon the land": *per* Lush, J., in *R. v. Great Northern Ry.* (1876), 2 Q. B. D. 151.

(2) N. had a lease for thirty years from February 5th, 1889, but subject to a proviso that the lessor, the Crown, might determine the lease on giving three months' notice in certain events and with certain limitations. On May 14th, 1891, a railway company gave N. a notice to treat for certain portions of the property. Nothing was done towards the summoning of a jury to assess compensation. On June 30th, 1892, the Crown exercised the power to give notice, and served N. with notice to quit in respect of that part of the land as to which the notice to treat had been given. The result was that N.'s interest in that portion of the land became an interest for three months only. On July 20th, 1892, the company gave notice that they required possession of that part of the land under sect. 85 of the Lands Clauses Act, and on same day took possession:—*Held* that, as nothing had been done under the notice to treat, the fact of its having been given was immaterial, and therefore a magistrate had jurisdiction under sect. 121 to determine the amount of compensation, and that the tenant's interest must be considered at the date when possession was taken: *R. v. Kennedy*, [1893] 1 Q. B. 533.

(c) A notice to treat is not equivalent to a notice requiring possession, and a tenant is not entitled to have compensation assessed under sect. 121 until he has received a notice requiring him to give up possession before the expiration of his term or interest.

Illustrations.

(1) Promoters served a notice to treat on the tenant of a house for a term which would expire within a year from the date of service of the notice. The tenant sent in particulars of his claim, and claimed to have compensation assessed under sect. 121. Nothing further was done by either party. It was *held* that it was a condition precedent to the right to compensation under this section that the tenant should be required to give up possession, and that a notice to treat is not equivalent to requiring possession: *R. v. Stone* (1866), L. R. 1 Q. B. 529. "The company have given a notice to treat as required by sect. 18, but they have done nothing more. The contention on behalf of the applicant is that giving notice to treat is equivalent to requiring possession to be given up under sect. 121. . . . The question, then, is whether a notice to treat is equivalent to requiring possession. It clearly is not, because in cases where a notice to treat has been given, the right to enter into possession can only be according to the modes pointed out by the statute—that is, either when the compensation has been settled or upon giving security for the amount under sect. 85. . . . The company, therefore, are not in a position to require possession to be given": *per* Cockburn, C.J., at p. 533, *ib.*

(2) "Now, as I read the section [*i.e.*, sect. 121], there is nothing to control it at all. All that is required on the part of the company or public body exercising the powers of the special Act is to give to those persons having a less interest than that of tenant from year to year notice demanding possession (it does not require them to give any notice to take), to go before justices to get the amount assessed, and then to pay that amount. That being done, they are entitled to possession. They do not require any conveyance": *per* Jessel, M.R., in *Syres v. Metropolitan Board of Works* (1877), 36 L. T. at p. 278.

(3) A railway company gave notice to treat to T., who was tenant for a term of certain premises. The term expired at Christmas, 1899, but the tenants held over on a yearly tenancy. In March, 1900, T. went out of actual occupation but retained the keys. On January 1st, 1901, T.'s lessor assigned his interest to the company. In February, 1901, the company entered and began to pull down the premises. T. claimed compensation under sect. 121:—*Held*, that it is a condition precedent to the right to have compensation assessed under sect. 121 that the claimant shall have been required to give up possession before the expiration of his term; and that in this case T. had not been so required: *Great Northern and City Ry. v. Tillett* (1902), 71 L. J. K. B. 525. "It is, however, a condition precedent to the right to claim compensation under sect. 121 that the claimant shall have been required to give up possession before the expiration of his term or interest therein": *per* Lord Alverstone, C.J., at p. 528, *ib.*

V. Effect of not taking possession after a notice requiring possession has been given.

If a notice requiring possession is given to a tenant, but possession is not taken, he may be able to establish a claim to compensation unless he has waived his right to it by agreement.

Illustrations.

(1) A railway Act provided that all tenants from year to year should deliver up possession at the expiration of six calendar months next after notice, whether such notices should be given with reference to the commencement of the tenancy or not. On January 10th the company gave six months' notice under the Act to a tenant from year to year whose holding began at Christmas; the tenant continued to occupy until the Christmas following, and was *held* not entitled to compensation: *R. v. London and Southampton Ry.* (1839), 10 A. & E. 3; 50 R. R. 306. In this case there appears to have been some agreement

between the parties which disentitled the tenant to claim compensation : see *Cranwell v. London Corporation*, *infra* (3).

(2) A tenant from year to year received notice from promoters to give up possession of his holding in six months. The promoters subsequently informed him that they should not take possession at the end of the six months. The tenant was *held* entitled to compensation for loss or injury sustained by him from the notice, in consequence of which he had taken other premises : *R. (or Chadwick) v. Rochdale Improvement Commissioners* (1856), 2 Jur. (N.S.) 861.

(3) Promoters in 1865 served on a yearly tenant notice, under a local Act which incorporated sect. 121 of the Lands Clauses Act, requiring possession of his holding in six months, but did not proceed to take possession under the notice. In 1867 they obtained an assignment of the interest of the landlord and demanded immediate possession, but no notice to quit was ever given to the tenant. They obtained possession under the local Act which, however, required payment of purchase or compensation money before possession should be taken. It was *held* that the tenant was entitled to compensation at least for the difference between the position of a tenant at sufferance and that of a tenant with a right to retain possession till a fixed and definite period : *Cranwell v. London Corporation* (1870), L. R. 5 Ex. 284.

VI. Limits of compensation assessable under sect. 121.

The section only applies to the case of a tenant who is required to give up possession. Any claim which a tenant whose interest is within the section may have in respect of land which is injuriously affected, but no part of which is taken, must be assessed under sect. 68. A similar rule applies with regard to a claim for severance from and injuriously affecting adjoining land the interest in which is not within sect. 121.

Illustrations.

(1) A railway company injuriously affected a public-house of which S. was tenant from year to year, but did not require him to give up possession before the end of his term. S. proceeded to claim compensation under sect. 68 :—*Held*, that S. had proceeded under the right section : *R. v. Sheriff of Middlesex, In re Somers and Metropolitan Ry.* (1862), 10 W. R. 717.

(2) N. held land under lease for thirty years, terminable as to the whole or any part by three months' notice. A railway company gave N. notice to treat as to part of the land, and subsequently N.'s lessor gave him three months' notice to determine the tenancy of that part of the leasehold. During the currency of the notice the company took possession under sect. 85 :—*Held*, that in assessing compensation under sect. 121 the justices had only jurisdiction to assess it in respect of the land taken and the damage by severance or otherwise to the adjoining land accruing during the continuance of the term of the land taken : *Bexley Heath Ry. v. North* (1894), 64 L. J. M. C. 17.

NOTE.—Where a yearly tenant gave up possession under a six months' notice from a company given under their special Act, and such notice expired in the middle of a half-year, the tenant had to pay that half-year's rent to his landlord unless he showed (1) that he could not have remained in possession ; and (2) that he could not have obtained compensation for his interest in the premises : *Wainwright v. Ramsden* (1839), 5 M. & W. 602.

VII. Jurisdiction of justices.

The jurisdiction of the justices is limited to determining—(a) whether or not the tenant has been required to give up possession; and (b) the amount of compensation.

Illustration.

The jurisdiction of the justices under sect. 121 is limited to determining the amount of the compensation on the basis of the interest alleged by the claimant, and does not extend to inquiring whether that interest is his true interest: *Great Northern and City Ry. v. Tillet* (1902), 71 L. J. K. B. 525. "It is, we think, obvious . . . that the justices must ascertain whether or not the claimant has been required to give up possession before the expiration of his term, because the *quantum* of compensation will depend upon that fact": *per* Lord Alverstone, C.J., at p. 528, *ib.*

VIII. Form of decision.

The justices or magistrate assessing compensation under sect. 121, cannot be compelled to put their or his assessment into writing.

Illustration.

Compensation having been claimed by a tenant from year to year, the matter was heard before a metropolitan magistrate, who gave his decision verbally:—*Held*, that the magistrate's decision (under sect. 121 of the Lands Clauses Act) was an award, not an order, and that the magistrate could not be compelled to put his decision into writing: *R. v. Combe* (1863), 32 L. J. M. C. 67.

Where greater Interest claimed than from Year to Year Lease to be produced.

122. If any Party, having a greater Interest than as Tenant at Will, claim Compensation in respect of any unexpired Term or Interest under any Lease or Grant of any such Lands, the Promoters of the Undertaking may require such Party to produce the Lease or Grant in respect of which such Claim shall be made, or the best Evidence thereof in his Power; and if, after Demand made in Writing by the Promoters of the Undertaking, such Lease or Grant, or such best Evidence thereof, be not produced within Twenty-one Days, the Party so claiming Compensation shall be considered as a Tenant holding only from Year to Year, and be entitled to Compensation accordingly.

Object of the section.

This section provides for the production to promoters of leases or grants by any person who has a greater interest than a tenant at will claiming compensation in respect of an unexpired term. The term "lease or grant,"

of course, includes an agreement for a lease of which specific performance would be decreed.

123. And be it enacted, That the Powers of the Promoters of the Undertaking for the compulsory Purchase or taking of Lands for the Purposes of the Special Act shall not be exercised after the Expiration of the prescribed Period, and if no Period be prescribed not after the Expiration of Three Years from the passing of the Special Act.

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I. The object of the section.

The object of this section is to limit the time within which the promoters of the undertaking may exercise their powers of compulsory purchase.

Illustration.

"The 123rd section of the Lands Clauses Consolidation Act requires that there shall be a prescribed period for the exercise of compulsory powers of purchase. There is not any provision in that Act that there should be a prescribed period beyond which the powers for constructing the railway shall not be exercised. Such a provision is now always inserted": *per* Lord Blackburn in *Tirerton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. at pp. 495—496.

II. The exercise of powers for the compulsory taking of lands.

(a) The exercise of the power for the compulsory taking of lands is begun by giving notice to treat, and that may be done even the day before the compulsory power expires. The notice to treat so given will remain good until the time limited for the completion of the works expires, and any time before its expiration the promoters may enter on the land whether or not it will be possible for them afterwards to complete the works within the period so limited.

Illustrations.

(1) Upon an application for an injunction to restrain a railway company from taking proceedings to summon a jury to assess compensation, Knight Bruce, V.-C., expressed the opinion that the plaintiff would have been entitled to the injunction sought but for the

fact that the time limited for the exercise of compulsory powers was about to expire. The doubt, however, as to the validity of such proceedings after that period—although the usual notice had been given of the intention of the company to take the land—was sufficient ground for declining to grant the injunction upon the company undertaking not to act upon the result of the jury process without the leave of the Court and bringing into court 200*l.* to answer the plaintiff's costs and charges by reason of the process, without prejudice to any question. The plaintiff would, however, have been entitled to have a jury summoned to assess the compensation : *Wood v. North Staffordshire Ry.* (1849), 3 De G. & Sm. 368.

(2) The limitation of time for the exercise of powers contained in sect. 123 does not apply where a landowner, having within the prescribed period received a notice that his land was required by the promoters, and having within that period regularly served them with a notice that he requires the amount of compensation to be determined by a jury, and, wishing to complete the sale of his land, applies for a *mandamus* to compel the company to issue a warrant for summoning a jury. In such a case the powers that the landowner wishes to be exercised are not "powers of the promoters of the undertaking for the compulsory purchase or taking of land" within sect. 123 : *R. v. Birmingham and Oxford Junction Ry.* (1850), 6 Rail. Cas. 628.

(3) A company whose powers of compulsory acquisition of lands were restricted by their Act to the period of three years gave a notice to treat on the day before that on which this period expired :—*Held*, that the notice had been given within the prescribed period, and was, therefore, good : *Edinburgh and Glasgow Ry. v. Monklands Ry.* (1850), 12 Ct. Sess. Cas. (2nd Series) 1304 ; 6 Sc. Rev. Rep. 1194.

(4) A company gave a landowner notice to treat and entered on the land under the 85th section. The purchase-money was not assessed, and no conveyance was executed. The three years' period having expired, it was *held* that the landowner might still have the purchase-money assessed, but that he could not re-enter upon the land : *Doe d. Armistead v. North Staffordshire Ry.* (1851), 16 Q. B. 526.

(5) A railway company gave a landowner notice to treat within the prescribed period. They then paid a deposit and gave a bond, as required by the 85th section. It was *held* that entry by the company upon the land in respect of which the notice was given was not an exercise of their powers of compulsory purchase, but an act made legal by the previous exercise of their compulsory powers, and that such entry need not be made within the prescribed period, the notice to treat having placed the company and the landowner in the position of purchaser and vendor of the land : *Salisbury (Marquis) v. Great Northern Ry.* (1852), 17 Q. B. 840.

(6) "It might be a very beneficial rule to lay down, that where a railway company is limited in time for taking land by compulsion, and is also limited in time for completing their works, then, if they sleep upon their works, when the time for completion of them has come, they should be held disabled from going on with any compulsory purchase" : *per* Lord Cairns in *Richmond v. North London Ry.* (1868), L. R. 3 Ch. at pp. 680—681.

(7) A railway company gave to A. notice that they required land of his for the purposes of their railway. The land was valued under the Railways Act (Ireland), but the award was delivered after the company's compulsory powers had expired. The company demanded an abstract of title, which was delivered, but the company never entered on the land. Before the expiration of the time for completion of the works A. demanded the company's certificate for the sum awarded. The company did not give the certificate. A. petitioned, praying for payment in of the sum awarded :—*Held*, that the whole contract was in force during the continuance of the powers of construction, and that A. was entitled to have the money paid in : *Cork and Youghal Ry. v. Harnett* (1871), L. R. 5 H. L. 111.

(8) "A notice to treat given by a company is perfectly good so long as the company are empowered to carry into effect their works under the Act of Parliament, and no longer. It may be given the day before the compulsory powers to take the land expire, and then it will last until the time for which that land is wanted, namely, the time for making the works, has also expired, but no longer": *per* Lord Hatherley in *Kemp v. South-Eastern Ry.* (1872), L. R. 7 Ch. at pp. 372—373.

(9) A railway company were prohibited by their special Act from exercising their powers of compulsory purchase after three years from the passing of the Act, and from exercising their power of making and completing the railway after five years from the same date. Shortly before the expiration of the three years the company served a notice to treat on a landowner, but nothing further was done as to the land in question until thirteen days before the expiration of the five years, when the company entered on the land under sect. 85 of the Lands Clauses Act. It was *held* that such entry was lawful, whether the railway could or could not have been completed within the thirteen days, and that the company were entitled to remain on the land and complete the railway after the expiration of the five years: *Tiverton and North Devon Ry. v. Loosemore* (1884), 9 App. Cas. 480. "If the notice to treat itself has been given before the expiration of the period prescribed for the exercise of the powers for the compulsory purchase of lands, these subsequent steps may be taken by either party, at least at any time before the lapse of the prescribed period within which the powers of the company for making and completing the railway must be exercised. It has not yet finally been decided whether or not they can be exercised after the lapse of that period": *per* Lord Blackburn at p. 493, *ib.*

NOTE.—In the following case, however, although notice to treat had been served before the expiration of the compulsory powers, the promoters were, having regard to the provisions of their special Act, restrained from completing the acquisition of the land.

Illustration to Note.

After fruitless negotiations by a railway company with a landowner for the purchase of his land, they summoned a jury to assess the value. The jury met, but before they found their verdict the time within which the powers of the company to take land compulsorily were to be exercised expired:—*Held* that, under the terms of the special Act, the landowner was entitled to an injunction restraining the company from depositing the amount found by the verdict, and from issuing any precept to the sheriff to deliver possession. On appeal the Lord Chancellor, pending a decision by a Court of law as to the expiration of powers, *held* that the injunction should be continued, the balance of injury, if the company were allowed to proceed in the meantime, appearing to be on the side of the landowner: *Brocklebank v. Whitehaven Junction Ry.* (1847), 5 Rail. Cas. 373.

(b) (i.) The time limited for compulsory purchase in a special Act may be extended by a later Act, and this may be so even if the later Act confers new powers.

Illustration.

The powers conferred upon a local board to acquire lands of B. expired in July, 1870. In the following August the board obtained an Act to extend the time for compulsory purchase. In December, 1870, the board served B. with notice to treat in respect of his property. No agreement was arrived at, and in July, 1876, the board gave notice of their intention to summon a jury. B. moved for an injunction:—*Held*, that the extension of time related to taking lands for the purposes of the earlier Act, that the powers as well as the time were extended, and that, the consent of the ratepayers having been given to the exercise of the powers under the earlier Act, no further consent was necessary: *Bentley v. Rotherham Local Board* (1876), 4 Ch. D. 588.

- (ii.) But if, after the compulsory powers have expired and after the works have been completed, a new Act is obtained for the purpose of taking additional lands, this does not effect an extension of time under the earlier Act, and lands which are subject to the provisions of both Acts cannot be taken under a notice to treat given under the earlier Act. In such a case a fresh notice to treat is requisite.

Illustration.

A railway company, after the compulsory powers of their original Act had expired and the railway was opened, obtained another Act enabling them to take additional land. It was *held* that they could not take a piece of land subject to the compulsory powers of both Acts under a notice to treat which had been given under the original Act: *Richmond v. North London Ry.* (1868), L. R. 3 Ch. 679.

- (c) In computing the period limited by the special Act the day on which the Act received the Royal assent must be excluded.

Illustration.

By a company's special Act it was provided that its powers for the compulsory purchase of lands "shall cease after the expiration of three years from the passing of this Act." The Act received the Royal assent on August 9th, 1899. On August 9th, 1902, the defendants served a notice to treat on the plaintiffs:—*Held*, that the notice was served in time; the day on which the Act received the Royal assent has to be excluded in computing the time within which the company's powers of purchasing land compulsorily continue: *Goldsmiths' Company v. West Metropolitan Ry.* (1903), 72 L. J. K. B. 931.

- (d) If promoters take lands or rights of property in lands the property acquired remains in them notwithstanding the expiration of the time limited for the completion of the works, and they may afterwards use them for the purposes contemplated by the Act without being called upon to pay further compensation.

Illustration.

The B. Water Commissioners were empowered by their Act, which contained provisions similar to those of the Lands Clauses Act, to purchase or take on lease certain streams which supplied water-power to G.'s mills. G. claimed compensation for the loss of these streams, and compensation was awarded. G. traversed the award, and by agreement a verdict was taken for a certain sum for G.'s interest "in the waters required for the purpose of the Act, their property, for compensation for injury to other premises held by the traversers, and for all rights, easements, and powers affecting the property of the traversers, acquired for the purposes of the Act, and for all consequential damage." The commissioners did not divert any part of D., one of the streams belonging to G., during the continuance of the time limited for completion of their works. The commissioners subsequently obtained another Act, under the powers of which they diverted the D. stream. G. claimed compensation:—*Held*, that the commissioners had acquired by payment of the agreed compensation the whole water rights in the D. stream, and that G. was not entitled to compensation: *Girdwood v. Belfast Water Commissioners* (1877), 1 L. R. Ir. 28.

- (e) If the special Act fixes periods for the exercise of compulsory powers of purchase of land required for specific works, but is silent as to

the limits of such powers with respect to the general purposes of the Act, then sect. 123 applies to land required for such general purposes, and the powers in respect of these must be exercised within three years of the passing of the special Act.

Illustration.

An Act which specifically distinguished the works authorised to be made by a railway company limited different periods for the exercise of the compulsory powers of purchase in respect of land required for the specific works, but contained no limit of such powers with respect to the general purposes of the Act. It was *held* that, as to land required for such general purposes, sect. 123 of the Lands Clauses Act applied: *Seymour v. London and South-Western Ry.* (1859), 5 Jur. (N.S.) 753.

(f) If notice to treat has been given before the expiration of the period limited for the exercise of compulsory powers, and after that period has expired counter-notice is given, the promoters may have the value of the whole assessed by a jury under the counter-notice.

Illustrations.

(1) A railway company gave P. notice to treat three days before the time limited for exercise of the compulsory powers; and P. fourteen days afterwards, by a counter-notice, required the company to take the whole of his manufactory. The company, after some litigation, consented to take the whole of the manufactory, and proceeded to ascertain its value by summoning a jury under the Lands Clauses Act:—*Held*, that they were at liberty to do this: *Pinchin v. London and Blackwall Ry.* (1854), 1 K. & J. 36.

(2) The L. Railway Co. gave S. notice to treat for part of his manufactory; S. gave a counter-notice requiring the company to take the whole. The company wrote to S. fourteen months later proposing to purchase the whole of the manufactory, the company's compulsory powers having expired in the meantime. The company gave S. notice of their intention to summon a jury. S. moved for an injunction to restrain them from proceeding:—*Held*, that the relation of vendor and purchaser created by the notice was extended to the whole property by the counter-notice, and that though assent by the company was necessary, this need not be given before the expiration of their compulsory powers: *Schwinge v. London and Blackwall Ry.* (1855), 24 L. J. Ch. 405.

III. Agreements.

The section only applies to the exercise of compulsory powers, and not to agreements.

Illustrations.

(1) A railway company contracted with a landowner to pay a certain sum for the part of his land to be taken by the company. Specific performance of the contract was enforced against the company; and it was *held* that the fact that the time limited for the exercise of the company's compulsory powers had expired did not relieve them from their obligation to complete their contract: *Webb v. Direct London and Portsmouth Ry.* (1852), 9 Hare, 129.

(2) A railway company in 1846 served notice to treat upon M., which not being complied with, the company in 1847 served a second notice offering a nominal sum for purchase-money and compensation, and intimating that if the sum were not accepted

they would proceed to have the amount due assessed by a jury. M. refused the sum offered, but afterwards (in May, 1847) agreed to accept 110*l*. The company constructed the greater part of their line, but neither took possession of M.'s land nor paid the 110*l*. In 1849 their compulsory powers, and in 1851 their power to construct the railway, expired. A petition afterwards filed by M. praying specific performance of the agreement of May, 1847, or alternatively that the company might be compelled to complete the purchase in compliance with the notice to treat of 1846 and with the Lands Clauses Act, was dismissed without prejudice to M.'s right to proceed at law on the agreement of 1847 : *Munroe v. Newry, Warrenpoint and Rostrevor Ry.* (1852), 2 Ir. Ch. R. 260.

(3) A landowner sold land to a railway company, and it was agreed that if the company should "require any additional land of the vendor, adjoining or near the land sold, for the purposes of the railway and works, the same should be taken and paid for by the company" at a certain price per acre. It was *held* that this agreement authorised the company to take adjoining land for the purpose of their works at any time before the period limited by their Act for the completion of the works; and that, though their compulsory powers had expired, they could acquire land under the agreement : *Rangeley v. Midland Ry.* (1868), L. R. 3 Ch. 306.

(4) By an agreement expressed to be supplemental to the Lands Clauses Act a landowner agreed to sell land to a railway company, and that if the company should require more land they should pay for the same at the rate of 100*l*. per acre. Before the company's compulsory powers of purchase had expired they by mistake gave the landowner notice to treat for three acres more land; and before the time for completion of the works had expired they took possession of the three acres. It was *held* that the company had power under the agreement to take such land as they required at the agreed price until the time for the completion of the works had expired : *Kemp v. South-Eastern Ry.* (1872), L. R. 7 Ch. 364.

NOTE, however, the case of a contract which had assumed the promoters to be in full possession of their powers.

Illustration to Note.

Where the time limited for making a railway had expired, and where, consequently, the powers of the company acting under their Act had ceased, it was *held* that the company could not be called upon to enter into an arbitration under a contract which had assumed them to be in full possession of their powers : *Scottish North-Eastern Ry. v. Stewart* (1859), 3 Macq. H. L. 382.

IV. Mandamus.

It was formerly thought that a mandamus would lie to compel the promoters to complete the works, but it is now settled that it will not lie except as in a special case, as in Illustration (4), p. 768 (*see* sect. 21, *ante*, p. 171).

V. Meaning of "special Act" : Military Lands Act, 1892.

Illustration.

Although the Military Lands Act, 1892, is defined in sect. 2 (2) to be the "special Act," yet for the purposes of sect. 123 of the Lands Clauses Act the "special Act" must be deemed to be the Act of 1892, together with the subsequent Act of 1895, confirming a provisional Order under the Act of 1892 relating to the lands in question : *Hill v. Haire*, [1899] 1 I. R. 87.

Interests omitted to be Purchased.

And with respect to Interests in Lands which have by Mistake been omitted to be purchased, be it enacted as follows :

Promoters of the Undertaking empowered to purchase Interests in Lands the Purchase whereof may have been omitted by Mistake.

124. If, at any Time after the Promoters of the Undertaking shall have entered upon any Lands which under the Provisions of this or the Special Act, or any Act incorporated therewith, they were authorised to purchase, and which shall be permanently required for the Purposes of the Special Act, any Party shall appear to be entitled to any Estate, Right, or Interest in or Charge affecting such Lands which the Promoters of the Undertaking shall through Mistake or Inadvertence have failed or omitted duly to purchase or to pay Compensation for, then, whether the Period allowed for the Purchase of Lands shall have expired or not, the Promoters of the Undertaking shall remain in the undisturbed Possession of such Lands, provided within Six Months after Notice of such Estate, Right, Interest, or Charge, in case the same shall not be disputed by the Promoters of the Undertaking, or in case the same shall be disputed then within Six Months after the Right thereto shall have been finally established by Law in favour of the Party claiming the same, the Promoters of the Undertaking shall purchase or pay Compensation for the same, and shall also pay to such Party, or to any other Party who may establish a Right thereto, full Compensation for the mesne Profits or Interest which would have accrued to such Parties respectively in respect thereof during the Interval between the Entry of the Promoters of the Undertaking thereon and the Time of the Payment of such Purchase Money or Compensation by the Promoters of the Undertaking, so far as such mesne Profits or Interests may be recoverable in Law or Equity; and such Purchase Money or Compensation shall be agreed on or awarded and paid in like Manner as according to the Provisions of this Act the same respectively would have been agreed on or

awarded and paid in case the Promoters of the Undertaking had purchased such Estate, Right, Interest, or Charge before their entering upon such Land, or as near thereto as Circumstances will admit.

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Preliminary.—This section deals with the case of lands permanently required for the purposes of this or the special Act, but which through mistake or inadvertence have not been paid for by the promoters, although possession of them has been taken for the purposes of the undertaking.

In such a case the promoters may remain in possession, but must pay compensation and mesne profits within six months after notice of the claim or, in case of dispute, after its settlement in favour of the claimant.

I. Promoters can only avail themselves of this section in cases which arise “through mistake or inadvertence.”

Illustration.

A railway company entered upon lands subject to a mortgage of the existence of which they were ignorant. On the mortgagee giving notice of his rights they did not dispute his title. It was *held* that the mortgagee could not under these circumstances maintain ejectment, as the company had a right to possession for six months after notice of his claim. “The words are, the company ‘shall remain in undisturbed possession’ if they duly compensate. These words express that the possession not only is then lawful, but has been, and shall continue so, if the condition is performed”: *per* Erle, C.J., in *Jolly v. Wimbledon and Dorking Ry.* (1861), 1 B. & S. 807.

II. Where promoters enter upon land knowing that they have not paid for some estate or interest in respect of it there is no “mistake or inadvertence.”

Illustrations.

(1) A railway company took possession of land and proceeded to have the amount of compensation assessed as against the landowner, but not as against his mortgagees. The amount awarded was less than the amount paid into court by the company and also less than the amount of the mortgage debt. It was *held* that there was no “mistake or inadvertence” on the part of the company, and that this section did not apply, inasmuch as the company had known throughout of the existence of the mortgage: *Martin v. London, Chatham and Dover Ry.* (1866), L. R. 1 Ch. 501.

(2) A railway company took possession of a meadow a large part of which belonged to one owner and a small part to another. They took a conveyance of the large part, but paid nothing for the small part, the owner of which, having obtained judgment in an action of ejectment, took possession by stretching a rope across the railway, which the first train broke. He then filed a bill to restrain the company from interfering with his possession, and also from proceeding under a notice to treat. It was *held* that there had been no "mistake or inadvertence" within the meaning of this section, and a decree was made for payment of the improved value of the land and of the amount of mesne profits for six years: *Stretton v. Great Western and Brentford Ry.* (1870), L. R. 5 Ch. 751.

(3) On September 23rd, 1903, the M. Railway Co. gave notice to treat to C. in respect of certain land. This notice did not include 528 square yards belonging to C. On October 21st, 1903, a claim was made in respect of the land included in the notice to treat. On October 25th the company entered upon the land, including the 528 yards, and on the same day C.'s solicitors wrote to the company complaining of what was being done, but prior to November 3rd, 1903, no complaint was specifically made by C. that land not included in the notice had been entered upon by the company; on the latter date, however, complaint was made. Correspondence ensued, and on November 21st it was found as a fact that the company knew that they had entered upon land not included in the original notice to treat. Final possession of the whole was taken on November 23rd. On November 25th C. issued a writ against the company to restrain them from retaining possession of the 528 square yards; two days later notice to treat in respect of this piece of land was given by the company:—*Held* on the facts, that there had been no entry for permanent purposes by the company before November 23rd, and that at that time the company were under no "mistake or inadvertence" as to the 528 yards, and that they must pay the costs of the action: *Cardwell v. Midland Ry.* (1904), 21 T. L. R. 22.

III. If a claim under this section in respect of an interest omitted to be paid for is disputed, the claimant can establish his rights by action; and if such action is an action to recover the land, it is no defence to say that this section provides for the "undisturbed possession" of the promoters.

Illustration.

Part of a turnpike road was taken by a railway company. The owner of adjoining land was held entitled to possession in an action of ejectment on the ground that there was a presumption that the soil of the road was in him. It was *held* that this section formed no defence to the action. "It is said that the maintenance of an action of ejectment is inconsistent with the company's remaining in undisturbed possession. But the plaintiff must establish his title; and how is he to do this unless by an action of ejectment? An action of trespass is not the legitimate course for establishing a title to land. That can only properly be done by an ejectment, which is quite a matter of right. The plaintiff's title being established, the company may remain in undisturbed possession by means of a motion to stay execution": *per* Crowder, J., in *Salisbury (Marquis) v. Great Northern Ry.* (1858), 5 C. B. N. S. 174 at p. 216.

IV. Promoters can avail themselves of this section within six months of the ultimate judicial decision in favour of the claimant.

Illustration.

Promoters paid to a landowner the amount awarded in respect of lands taken by them and took possession, having made a statutory conveyance to themselves describing the

land according to an inaccurate plan and book of reference which gave the landowner two roods and five perches less than he possessed. The landowner recovered possession of the two roods and five perches in an action of ejectment, and within six months after a motion for a new trial had failed the promoters took proceedings under this section. It was *held* that they were entitled to do so : *Hyde v. Manchester Corporation* (1852), 5 De G. & Sm. 249.

V. In a proper case claimants may recover damages for trespass against promoters who enter on their lands without paying for them.

Illustration.

A railway company entered and erected works upon lands subject to leases. Such entry was made with the consent of the freeholders, the company at first denying the lessee's title and only offering to treat after action brought. The company were *held* liable in damages for trespass : *Thomas v. Barry Dock and Ry.* (1889), 5 T. L. R. 360.

VI. Railway companies will not, however, be restrained from entering on lands required for their undertaking merely because there may be errors or omissions in plans and books of reference.

Illustration.

A railway company obtained a special Act which incorporated the Lands Clauses Act and the Railways Clauses Act, and after reciting that plans and sections had been made and deposited, enacted that the line should be made upon the lands delineated in the plan and described in the book of reference. The book of reference omitted the names of certain intermediate lessees for long terms, who were not aware of the intention to take their land until notices to treat were served on them after the passing of the Act. It was *held* that the difficulty which was intended to be corrected by sect. 7 of the Railways Clauses Act was that there might be some omission either of the land in the plan or of the owner in the book of reference rendering identification difficult ; and an interim injunction restraining the company from taking the land in question was dissolved : *Kemp v. West End and Crystal Palace Ry.* (1855), 1 K. & J. 681.

How Value of
such Lands to be
estimated.

125. In estimating the Compensation to be given for any such last-mentioned Lands, or any Estate or Interest in the same, or for any mesne Profits thereof, the Jury, or Arbitrators, or Justices, as the Case may be, shall assess the same according to what they shall find to have been the Value of such Lands, Estate, or Interest, and Profits, at the Time such Lands were entered upon by the Promoters of the Undertaking, and without regard to any Improvements or Works made in the said Lands by the Promoters of the Undertaking, and as though the Works had not been constructed.

Object of the section.

This section provides that compensation for lands on which promoters have entered by mistake without paying for them is to be estimated as at the time of entry. But compensation may be given according to the improved value if the promoters are in the position of wrong-doers.

Illustration.

Promoters took land and used it for the purposes of their undertaking without paying for it or taking any proceedings to have compensation awarded for fourteen years. Proceedings having been taken against them by the owner of the land, they offered to pay the value of the land at the time of their entry. But the landowner was under the circumstances *held* entitled to the improved value: *Stretton v. Great Western and Brentford Ry.* (1870), L. R. 5 Ch. 751.

Promoters of the Undertaking to pay the Costs of Litigation as to such Lands.

126. In addition to the said Purchase Money, Compensation, or Satisfaction, and before the Promoters of the Undertaking shall become absolutely entitled to any such Estate, Interest, or Charge, or to have the same merged or extinguished for their Benefit, they shall, when the Right to any such Estate, Interest, or Charge shall have been disputed by the Company, and determined in favour of the Party claiming the same, pay the full Costs and Expenses of any Proceedings at Law or in Equity for the Determination or Recovery of the same to the Parties with whom any such Litigation in respect thereof shall have taken place; and such Costs and Expenses shall, in case the same shall be disputed, be settled by the proper Officer of the Court in which such Litigation took place.

Effect of the section.

If litigation is necessary to enable claimants to establish their claim to land on which promoters have entered without payment, the promoters must, in addition to the compensation awarded, pay the costs of such litigation as between solicitor and client.

Illustration.

Promoters having perfected their title to land the purchase of which by them had been omitted by mistake, applied for a stay of proceedings upon a judgment in an ejectment action which had been obtained by the landowner upon the terms of their paying to him his "full costs and expenses" of the action and costs of the application. It was *held* that "full costs and expenses" meant "costs as between solicitor and client": *Doe d. Hyde v. Manchester Corporation* (1852), 12 C. B. 474.

Sale of Superfluous Land.

And with respect to Lands acquired by the Promoters of the Undertaking under the Provisions of this or the Special Act or any Act incorporated therewith, but which shall not be required for the Purposes thereof, be it enacted as follows :

Lands not wanted
to be sold, or in
default to vest
in Owners of
adjoining Lands.

127. Within the prescribed Period, or if no Period be prescribed within Ten Years after the Expiration of the Time limited by the Special Act for the Completion of the Works, the Promoters of the Undertaking shall absolutely sell and dispose of all such superfluous Lands, and apply the Purchase Money arising from such Sales to the Purposes of the Special Act; and in default thereof all such superfluous Lands remaining unsold at the Expiration of such Period shall thereupon vest in and become the Property of the Owners of the Lands adjoining thereto, in proportion to the Extent of their Lands respectively adjoining the same.

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I. The object of the section.

Illustrations.

(1) "We naturally expect that lands taken by compulsory powers shall, if not wanted for the railway, be restored to the proprietors from whom they have been compulsorily taken. But the company is left to deal with the lands which they have acquired by private treaty as any ordinary proprietor may do. By the 12th and 13th clauses of the Lands Clauses Consolidation (Scotland) Act they are left at liberty to sell those lands from time to time and to acquire other lands. The contention, therefore, that those lands became by disuse and lapse of time superfluous within the meaning of the 120th section is a mere mistake. The lands that come within the 120th section are not lands acquired by a private agreement": *per* Lord Westbury in *City of Glasgow Union Ry. v. Caledonian Ry.* (1871), L. R. 2 H. L. Sc. 164.

(2) The object of this section is "to secure to the landowners from whom land is taken by compulsion a reverting, as nearly as the Legislature can accomplish it, of all land which becomes useless or not wanted for the purpose of the national enterprise which has been sanctioned by Parliament": *per* Lord Cairns in *Great Western Ry. v. May* (1874), L. R. 7 H. L. at p. 293—294.

II. Application of the section.

(a) The operation of this section may be excluded either expressly or by implication, in which case the promoters may sell superfluous lands without restriction. Such an exclusion occurs in sect. 176 of the Public Health Act, 1875, and this section 127 is not incorporated in the Small Holdings Act, 1892.

Illustrations.

(1) A special Act gave a railway company power to hold and let and mortgage superfluous lands. It was *held* that this had the effect of relieving the company from the obligations imposed by the Lands Clauses Act and of conferring upon them unrestricted powers of sale: *Tomlin v. Budd* (1874), L. R. 18 Eq. 368.

(2) The T. District Council under the powers of the Public Health Act, 1875, required land for the purpose of disposing of sewage; part of the land was not immediately required for this purpose, but would probably be ultimately required:—*Held*, that it was not inconsistent with the purposes for which the land was acquired to use it in the interim in any lawful manner, such as a recreation ground, provided care was taken to prevent rights over it being acquired by the public, which would interfere with its being used for the authorised purpose when required: *Att.-Gen. v. Teddington District Council*, [1898] 1 Ch. 66.

NOTE that, unless the operation of the section is expressly or impliedly excluded, even a local authority is completely bound by it.

Illustration to Note.

The H. District Council purchased land for the purpose of disposing of sewage under the powers of the Public Health Act, 1875. They proposed to erect an isolation hospital on part of the land, and after a local inquiry obtained an order from the Local Government Board in that behalf :—*Held*, that the council had no power permanently to apply land to another purpose than that authorised, and that the Attorney-General and the original owner of the land were entitled to restrain them by injunction from doing so : *Att.-Gen. v. Hamwell District Council*, [1900] 2 Ch. 377.

(b) The section does not apply where the railway is abandoned or given up. In such a case, in the absence of provisions in the special Act, reference should be made to the Railways Abandonment Act, 1850, *post*.

Illustrations.

(1) A railway company took land for the purpose of a branch railway which they subsequently abandoned. Before the ten years' period had elapsed they promoted a Bill to enable themselves to make another branch railway, and for that purpose commenced working on the land. The owner from whom they had acquired the land claimed a reconveyance of it from them, on the ground that the undertaking for which the land had been originally acquired had been abandoned. It was *held* that the landowner's claim could not be supported under the sections of the Lands Clauses Consolidation Act which relate to superfluous lands, and that he had no equity to restrain the company from any user of the land not shown to be productive of irreparable injury to it : *Astley v. Manchester, Sheffield and Lincolnshire Ry.* (1858), 2 De G. & J. 453.

(2) "Sect. 127 of the Lands Clauses Act does not apply where the railway is abandoned or given up, but to superfluous land" : *per* Bramwell, L.J., in *Smith v. Smith* (1868), L. R. 3 Ex. 282 at p. 286.

(3) The I. Railway Co. took lands under their statutory powers in 1863. The time for completion expired in 1869, but the railway was not completed till 1875. It was found defective on trial, and was never used for public traffic. There was a line along the quays at D. crossing a dock by a swivel bridge. The rails were gradually worn away or removed by the public traffic on the quays, and the bridge became ruinous. The tenant of the lands part of which were taken under the Act was in the habit of carting goods over the railway. By the terms of the special Act the railway was to be so constructed as not to inconvenience the general traffic on the quays :—*Held*, (1) that the land was not superfluous land within sect. 127 ; (2) that there was no adverse occupation shown which would bar the company's title to the land : *In re Duffy's Estate*, [1897] 1 I. R. 307.

NOTE.—The Lands Clauses Consolidation Act is incorporated into the Public Health Act, 1875, with certain exceptions, and this section is one of them.

(c) This section does not apply to land taken for extraordinary purposes.

Illustrations.

(1) The C. Railway Co. acquired lands by agreement for extraordinary purposes ; they were not used for the statutory purposes nor sold within the time limited by the special Act :—*Held*, that they were not "superfluous lands" within the meaning of sect. 127

(sect. 120 of the Scottish Act), as the rule as to the sale of superfluous lands only applies to land acquired compulsorily and not to lands acquired by agreement for "extraordinary purposes": *City of Glasgow Union Ry. v. Caledonian Ry.* (1871), L. R. 2 H. L. Sc. 160.

(2) "It seems to me that lands purchased for extraordinary purposes may be properly said to have been acquired under the provisions of those Acts [*i.e.*, the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845] and the special Act; but that owing to the very words of the Lands Clauses Consolidation Act, 1845, ss. 12 and 13, it is at the very least doubtful whether they can be deemed to vest in the adjacent owners at the expiration of the specified time, or to be subject to the right of pre-emption": *per* Brett, L.J., in *Hooper v. Bourne* (1887), 3 Q. B. D. at p. 281.

(d) This section does not apply to a case where the Legislature has given a company power only to purchase land and not to acquire it compulsorily.

Illustration.

A railway company were authorised by their special Act to purchase a bridge across a river and land connected therewith from the owners upon terms to be mutually agreed upon. An action of ejectment was, after the construction of the railway, brought against the company in respect of some of the land connected with the bridge and not included in the limits of deviation of the railway, on the ground that it had become superfluous land. It was *held* that sect. 127 had no application to a case where the Legislature had given the company power only to purchase land and not to acquire it compulsorily: *Horne v. Lympington Ry.* (1874), 31 L. T. 167.

(e) Where the company has been granted compulsory powers this section appears not to be restricted to cases where land has been acquired under those powers.

Illustration.

"I think also that sect. 127 of that statute and those which follow are not restricted to cases where land has been acquired under what are called its compulsory powers. . . . It seems to me that the object of these sections is as applicable to lands acquired by negotiation, where the special Act confers a power to take them, as to lands which are not so acquired. If a different construction were adopted, it would be hard to draw a line as to the application of these sections": *per* Bramwell, L.J., in *Hooper v. Bourne* (1877), 3 Q. B. D. at p. 172.

III. What is superfluous land. How land may become superfluous.

(a) Land "required for the purposes" of the undertaking is not superfluous land. Land is required for the purposes of the undertaking—

When it is actually used for the railway or works or is required for works; or

When it will be so required within a definite and ascertained time; or

When, though not actually in use, it will be wanted owing to the growing traffic within a reasonable time; or

When it is necessary for the purposes of the undertaking as set out above, but cannot be so used for want of funds.

Illustrations.

(1) *Beauchamp (Earl) v. Great Western Ry.* (1868), L. R. 3 Ch. 745, *post*, p. 694.

(2) "Land is 'required' by a railway company where they have actually used it for laying down the rails over which the trains carrying their traffic pass and repass, or for erecting works necessary in conducting their business. I think also that land is 'required' where, although it is not at the moment used by the company, it will be wanted within a definite and ascertained time. . . . I think that there is also a third class of cases where land may properly be said to be 'required' for the purpose of the undertaking, that is to say, where at the expiration of the period the land, though not in actual use, will be, owing to the growing traffic of the line, wanted for the railway within a reasonable time which it is not possible to specify. . . . I do not think any land is required for the purpose of an undertaking merely because some person may be found to say that very likely at some time it may be wanted": *per* Bramwell, L.J., in *Hooper v. Bourne* (1877), 3 Q. B. D. at pp. 274—275; affirmed on appeal 5 App. Cas. 1 (see *infra*). "When a thing is said to be required for the purposes of a railway, it is not meant that no equivalent or substitute for it can be found, but it is meant that the thing is, or will be at a future time, useful for carrying on the traffic": *per* Bramwell, L.J., at p. 280, *ib.*

(3) Small pieces of land near a railway station and connected with the modes of access to it were claimed as superfluous. Evidence was given by the railway company's engineer and traffic manager that, ten years after the land had been acquired, there were definite purposes connected with the railway which would be served by the retention of the land, although the necessary works for adapting it to these purposes had not been executed for want of funds. The House of Lords *held* that the lands were not superfluous: *Betts v. Great Eastern Ry.* (1879), 49 L. J. Ex. 197.

(4) The N. Railway Co., who were bound to sell superfluous land before 1860, let four acres adjoining a station to M., the adjoining proprietor, and in 1854 sold three and three-quarter acres of the land to him. M. remained in possession of the whole without payment of rent till 1876:—*Held*, that the reserved quarter of an acre of the land did not vest in M. as superfluous land, because—(1) the land was required for the purposes of the railway; (2) this had been foreseen before 1860: (3) when in 1854 the company sold all the lands they could safely part with, they especially reserved this small piece: *North British Ry. v. Moon's Trustees* (1879), 6 Ct. Sess. Cas. (4th Series) 640.

(5) A railway company purchased certain lands by agreement. Their compulsory powers came to an end in 1853. Portions of this land were not used by the company, but were let on a yearly tenancy. In May, 1875, the adjoining owner claimed them as superfluous lands. It was proved that in and since 1868 the lands had been required by the company for the construction of additional sidings:—*Held*, that they were not "superfluous lands." The burden of proof was on the claimant; non-user was not conclusive, and the fact that they were required in 1868 rendered it probable that such requirements were foreseen in 1853: *Hooper v. Bourne* (1880), 5 App. Cas. 1.

(6) H. sold to a railway company two pieces of land for the purpose of constructing thereon a station-house and other conveniences and works necessary or convenient for passenger and goods traffic, with a covenant that if any part should not be used for such purposes within five years, and so used at the end of that period, the company would either reconvey to H. or pay him for what was not so used at the rate of 75*l.* an acre. About fifty-two perches were used as garden ground by the station-master and porters, and about four

perches were occupied by a coal-shed let to a coal dealer by the company, and used for the sale of coal arriving by the railway :—*Held*, that the land was in use for the purposes mentioned in the conveyance, and that the company were not bound to reconvey or to purchase : *Harris v. London and South-Western Ry.* (1889), 60 L. T. 392.

(b) The word “required” means “necessary,” not “demanded.”

Illustration.

“In the preamble to this 127th clause the word ‘required’ is clearly used in the sense not of demanded, but of necessary” : *per* Lord Selborne in *Great Western Ry. v. May* (1874), L. R. 7 H. L. at p. 303.

(c) The question whether lands are or are not superfluous being a question of mixed law and fact should, as a rule, be tried without a jury.

Illustrations.

(1) An action was commenced in the Chancery Division to restrain a railway company from trespassing on land to which the plaintiff claimed a title on the ground that it was “superfluous” and unsold at the expiration of the prescribed statutory period. The plaintiff gave notice of trial before a judge and a special jury at the assizes. On a motion that the action might be tried without a jury, it was *held* that, the question being one of mixed law and fact, it could be more conveniently tried without a jury : *Smith v. North Staffordshire Ry.* (1880), 44 L. T. 85.

(2) The C. Railway Co. were bound by their special Act to dispose of superfluous land by July 16th, 1892. They had acquired two plots under their compulsory powers which they had enclosed with railings and had converted into ornamental grounds. The company both before and after 1892 had been negotiating for the sale of the plots, and had let part of one of the plots for five years in 1895. The adjoining proprietor claimed the plots as superfluous land. The company alleged that the land was required for the purposes of their undertaking :—*Held*, that the question whether the lands were superfluous on July 17th, 1892, was a mixed question of law and fact ; that in fact the plots were “lands required for the purposes of the undertaking” ; and that the acts of the company did not bar or estop them from insisting that the lands were required : *Macfie v. Callander and Oban Ry.*, [1898] A. C. 270.

(d) Land may become superfluous in any of the following ways :—

It may have been taken under a wrong estimate or calculation of the quantity required for the purposes of the undertaking ; or
The promoters may only have wanted part and have been compelled to take the whole of the premises ; or

It may have been taken for works, permanent at the time but subsequently abandoned ; or

It may have been taken for a temporary purpose which has come to an end.

Illustrations.

(1) Lands acquired by a railway company under their compulsory powers were at the end of ten years occupied as garden grounds by the permission of the company, who retained a right of re-entry thereon on short notice. The lands were claimed under this section as "superfluous" by an adjoining owner. It appeared that the company had deposited spoil on part of the lands, but had ceased to use them for that or any other purpose in connection with the railway. It was *held* that the lands had vested in the adjoining owner by operation of law: *Great Western Ry. v. May* (1874), L. R. 7 H. L. 283. "It may become 'superfluous land' in one of four different ways. . . . Land originally taken under the compulsory powers, but taken upon a wrong estimate or calculation of the quantity of land which would be required for a purpose for which it is afterwards found out, by experience, that less land than was originally supposed will be sufficient. . . . Land which, under the provisions of other clauses . . . the railway company may have been forced to take by reason of wishing to take a part only of premises. There, *ex hypothesi*, that which the directors are forced to take is not land which in any sense they wish to take or want for the purposes of their undertaking—it is thrust upon them for the benefit of the landowners, and obviously is superfluous land. . . . Land taken originally, and required originally, for the permanent works of the line, but which, in the course of subsequent years, turns out to have been occupied by works which are abandoned and which, by reason of the abandonment of those works originally supposed to be permanent, becomes land no longer required by the company. . . . Land which has been allowed to be taken by the company, or which has been forced to be taken by the company for temporary purposes, and which has been taken by the company with the intention originally of its being used only for temporary purposes, which temporary purposes have come to an end": *per* Lord Cairns at pp. 292, 293, *ib.*

(2) Turnpike trustees, acting under statutory powers, erected a toll-house, which was for some years used by their servant, who collected the tolls. In 1866, the toll-bar was taken down, and no toll was thereafter collected there. The house had been in the occupation of a man employed in the up-keep of the road, under the direction of the surveyor. It was stated by the trustees that it might become necessary to reinstate the toll-bar:—*Held*, that the owner of the adjacent land was entitled to a *mandamus* commanding the trustees to pull down the toll-house and take away the materials, the building being "useless and no longer required for the purposes of the road" within the meaning of 4 Geo. IV. c. 95, s. 57: *R. v. Greenlaw Turnpike Trustees* (1879), 4 Q. B. D. 447.

(e) The promoters may even before the expiration of the statutory period by their conduct determine that land is superfluous.

Illustrations.

(1) A railway company about two years after the purchase of land by them pursuant to a notice to treat sold part of it in pursuance of a contract made before the notice, and conveyed the land by a deed which recited that it was superfluous. It was *held* that, though ten years had not expired, the right of pre-emption under the 128th section had arisen, as the company had sold the land as superfluous: *Carington (Lord) v. Wycombe Ry.* (1868), L. R. 3 Ch. 377.

(2) The M. Railway Co. acting in excess of their statutory powers, conveyed land acquired for the purposes of their undertaking to the S. B. Railway Co. under an arrangement by which the land was to be used for the purposes of both companies. Before the expiration of ten years from the time fixed for the completion of the M. Company's works the owner from whom they had acquired the land brought an action to establish his right of pre-emption under sect. 128 of the Lands Clauses Act. It was *held*

that the conveyance to the S. Company did not of itself show that the land was superfluous; and that the plaintiff's right had not yet arisen, it appearing that the land would not have been superfluous had it remained in the hands of the M. Company, but that the conveyance must be set aside: *Hobbs v. Midland Ry.* (1882), 20 Ch. D. 418.

(3) "There is no doubt that the company can, before the expiration of the statutory period, determine that the land is superfluous and sell it, and it is equally clear that if at the end of the statutory period they think that the land may be required for the purpose of their railway, it is not then superfluous. When I say 'they think,' I mean if their proper advisers have fairly and reasonably come to that conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the company, or it may be delayed after the expiration of the statutory period without the land being actually used, but whenever it is determined, either before or after the expiration of that period, that the land is superfluous it becomes saleable or vests in the adjoining owner": *per* Jessel, M.R., in *London and South-Western Ry. v. Gomm* (1882), 20 Ch. D. at p. 584.

(4) The N. Railway Co. acquired under their compulsory powers land from D. By their Acts the company's powers of selling superfluous land finally expired in 1894. In 1883 the L. Railway Co. obtained an Act giving them power to purchase compulsorily part of the land from the N. Company; this Act specially reserved every "estate, right, title, interest, and advantage" of D. D. claimed that at the time of the sale of the land to the L. Company it was superfluous land within the meaning of sect. 127, and ought to have been first offered to him:—*Held*, that the Court ought not to infer from the compulsory powers of the Act of 1883 that the lands were superfluous, as not being required for the purposes of the N. Company, and that D.'s right of pre-emption did not arise: *Dunhill v. North-Eastern Ry.*, [1896] 1 Ch. 121.

(f) Land may be so treated as to be admittedly superfluous: *e.g.*, it may be put up for sale and described as "surplus land." To have this effect, however, the acts relied upon must have been authorised by the promoters.

Illustrations.

(1) In an action to recover a piece of superfluous land, the plaintiff proposed to show that thirteen years after the time when the company were bound to dispose of the land they put it up for sale by auction as superfluous and called the auctioneer to prove the conditions of sale on that occasion. He deposed that he received instructions to sell from a director and also from a person who had acted as the company's solicitor on former sales of land. It was *held* that this was not sufficient proof that the sale was by the authority of the company: *Moody v. London, Brighton and South Coast Ry.* (1861), 1 B. & S. 290.

(2) A railway company purchased land for the purposes of its railway, and, the whole of it not being required for those purposes, put up the rest for sale by auction, describing it in the particulars as "surplus land." It was *held* that this amounted to an admission by the company that the land put up for sale was superfluous land: *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610.

(g) Land may be so used by the promoters as to be held to be superfluous, even before the lapse of the statutory period.

Illustrations.

(1) Land taken by a railway company was subject to a term of years, and the tenant was not turned out, but continued to pay rent to the company. This fact was *held* no answer to a claim to the land as superfluous: *Moody v. Corbett* (1866), L. R. 1 Q. B. 510.

(2) A railway company bought land required for an embankment, but were subsequently obliged to devote part of it to making an occupation road as part of accommodation works which they were compellable to make. The company's vendor before the period fixed for the sale of superfluous lands claimed his right of pre-emption as to the land used for the road. It was *held* that the land was not superfluous, having been utilised for the purposes of the company's Acts. It was *also held* in this case that the claim would not have been premature if the land had in fact been superfluous : *Beauchamp (Earl) v. Great Western Ry.* (1868), L. R. 3 Ch. 745.

(3) A railway company bought part of a field under statutory powers and erected a post and rail fence on the boundary. They made a ditch within the fence, and threw up a bank on which they planted a quickset hedge. The fence was removed, and for more than twenty years the strip of land between the hedge and the site of the fence was occupied and cultivated with the remainder of the field without interference from the railway company except that their workmen went over it to trim the hedge. It was *held* that the strip of land was superfluous land : *Norton v. London and North-Western Ry.* (1879), 13 Ch. D. 268.

(4) A railway company sold as superfluous land a field which was bounded on one side by a wall, the footings of which extended under the land sold. In an action for trespass it was *held* that the land which lay above the footings of the wall had passed to the purchaser of the field and was superfluous : *Ware v. London, Brighton and South Coast Ry.* (1882), 31 W. R. 228.

(h) Land under arches carrying a railway is not superfluous land, nor is land over a cutting or minerals under the railway superfluous land.

Illustrations.

(1) A railway company built a station on land acquired under their Act. The station stood partly on arches. The company sold their superfluous lands and purported to grant a right of way under one of the arches leading to part of the land sold, though not a way of necessity. It was *held* that the company had no power to alienate any part of the land used for the railway or works; that the land under the arch could not be treated as superfluous land, nor the right of way as an easement within the term "superfluous land"; and that therefore an action to restrain interference with the right of way failed : *Mulliner v. Midland Ry.* (1879), 11 Ch. D. 611; this case was distinguished in *Ware v. London, Brighton and South Coast Ry.*, *infra*.

(2) A railway company purchased land for the purpose of making an underground railway. They excavated a cutting, constructed the line, covered the cutting with an arch, and restored the surface over the arch. They then entered into a contract for sale of part of the vacant space over the top of the arch. It was *held* that this space was not superfluous land. "I have no doubt that no land of which any part in a vertical line is required for the purpose of the railway vests in the adjoining landowners for want of sale within the ten years": *per* Jessel, M.R., in *In re Metropolitan District Ry. and Cosh* (1880), 13 Ch. D. 607.

(3) If a railway company buys a close of land with the minerals under it, and if it afterwards turns out that the surface of the close itself is required for the purposes of the railway, but that those purposes could be answered without preserving to the surface the mineral support in the usual way, there seems to be no authority that the railway company is bound to sell the minerals apart from the surface, and that in default of being so sold, the minerals would vest in the adjacent owners : *Hooper v. Bourne* (1880), 5 App. Cas. at p. 12.

(4) A railway company sold as superfluous land a plot abutting on the railway and divided from it by a wall, which was also the retaining wall of the railway. This wall was thicker at the base than at the surface, so that part of the land conveyed was vertically above the lower part of the wall:—*Held*, that the whole of the land conveyed was “superfluous land”: *Ware v. London, Brighton and South Coast Ry.* (1882), 52 L. J. Ch. 198.

IV. Time for selling superfluous lands.

(a) The land must be sold within the prescribed period, or if no period is prescribed, within ten years after the time limited for the completion of the works. If not so sold it vests in the adjoining owners.

Illustrations.

(1) “The clause contemplates the expiration of the ten years as the point of time at which the ultimate decision is to be made, and then all lands with regard to which, judging of the question of fact, you can predicate that they are at that moment superfluous, and not required for the purpose of the undertaking, are to vest in the adjoining landowners. . . . At the end of the ten years the clause of the Act of Parliament steps in, and, as I read it, takes possession of all land which at that time is in the position I have described, and vests that land in the owner of the adjoining land. It is an absolute, complete Parliamentary vesting of the land. . . . The vesting takes place, and no person has any power whatever to prevent it”: *per* Lord Cairns in *Great Western Ry. v. May* (1874), L. R. 7 H. L. at pp. 295—296, 298.

(2) “It has been laid down by an authority binding upon us, that for the purposes of this section the point of time to be considered is the last day of the ten years, and that if land is not then required by the company it is superfluous, although at a previous time it may have been required, or although at a subsequent time it may be required by them for the purposes of the undertaking. I agree with the view of the law as stated in the House of Lords in *Great Western Ry. v. May* (*supra*), even if that case did not bind us as the decision of a higher tribunal”: *per* Bramwell, L.J., in *Hooper v. Bourne* (1877), 3 Q. B. D. at p. 274.

(b) A new Act extending the time within which the promoters may dispose of superfluous lands does not defeat a right to unsold superfluous land already vested under the former Act at the time of the passing of the new Act.

Illustrations.

(1) A railway company after the expiration of ten years obtained a new Act extending the period at which lands were to be deemed superfluous. It was *held* that this enactment did not defeat a right to unsold superfluous land already vested under a former Act at the time of the passing of the new Act: *Moody v. Corbett* (1866), L. R. 1 Q. B. 510.

(2) At the time when a company's powers to dispose of superfluous lands expire, there is an absolute, complete Parliamentary vesting of superfluous lands in the adjoining owner; and the passing of a subsequent Act extending the time has no application, as the time is only extended with regard to lands which at the passing of the later Act are in the ownership and possession of the company: *Great Western Ry. v. May* (1874), L. R. 7 H. L. 282.

(c) The Court will, in a proper case, order the sale of surplus lands delivered in execution.

Illustrations.

(1) On July 23rd, 1867, the petitioners entered up judgment against the C. Railway Co. in an action to recover the balance of a bill of costs due to them, and they then petitioned under 27 & 28 Vict. c. 112 for a sale of certain small strips of land which had been actually delivered in execution to the petitioners in November, 1867, under a writ of *elegit*, the registry of which was still operative. The land was surplus land not required for the purposes of the railway, nor situate within a town, nor built upon, nor used for building purposes, and Lord C., who had a right of pre-emption, had agreed to purchase the land at its full value, which was less than the sum due under the judgment:—*Held*, that the petitioners were entitled to a sale without further inquiry, and the company was ordered to execute a proper conveyance: *In re Calne Ry.* (1870), 9 Eq. 658.

(2) A railway company obtained powers to extend the line of their railway from H. to C., and for that purpose to raise fresh capital in shares to be called extension shares. It was provided that the capital and new shares should constitute a separate capital, and that the profits of the extension line should be restricted to paying a dividend on the extension shares, that the holders of extension shares should not be entitled to dividends out of any other profits of the company, that the company might, under certain conditions, raise by mortgage certain additional sums, and that the money raised by new shares or by mortgage should be applied only for the purposes of the extension Act. O., a contractor, recovered judgment against the company and lodged a writ of *elegit* with the sheriff. He afterwards applied for an order directing a sale of the company's surplus lands, which included lands acquired under the powers of the extension Act:—*Held*, that O. was entitled to an order for sale; for that, whatever might be the rights of the different classes of shareholders *inter se*, the lands were lands of the company and liable to be sold for payment of any judgment debts of the company: *In re Ogilvie* (1871), L. R. 7 Ch. 174; and see *Stagg v. Medway Navigation*, [1903] 1 Ch. 169.

V. The sale of superfluous lands.

(a) The sale of superfluous lands must be absolute or it is bad, but the sale may be subject to building or other restrictions.

Illustrations.

(1) Land not required for the purposes of a railway company was conveyed to a purchaser, who covenanted that he, his heirs or assigns, would on repayment of the purchase-money reconvey the land to the company whenever it might be required for the purposes of their undertaking. It was *held* that the covenant reserved to the company an interest in the land, and that the sale was *ultra vires* and void, inasmuch as land sold as superfluous land must be sold absolutely: *London and South-Western Ry. v. Gomm* (1882), 20 Ch. D. 562; this case was distinguished in *Ray v. Walker*, *infra*.

(2) On a sale by a railway company of superfluous land the purchaser entered into covenants not to build houses thereon of less than a certain value, and that no building erected on the property should be used as a public-house or as gasworks. It was *held* that the covenants were binding covenants, there being nothing in the Act to prevent the company from selling superfluous land in the way most advantageous to itself: *In re Higgins and Hitchman's Contract* (1882), 21 Ch. D. 95.

(3) Superfluous land was conveyed by a railway company on July 12th, 1867, the period for the sale under the special Act expiring on the next day. The conveyance contained

a covenant by the purchasers for payment of the purchase-money with interest on or before July 12th, 1869; and by an indenture of even date with the conveyance it was declared that the company should have a lien on the land until payment of the purchase-money and interest. The purchase-money and interest were eventually paid; but on a sale of the land in 1886 it was objected that an absolute sale and conveyance of the land had not been made before July 13th, 1867, the company having retained an interest in the land after that date. It was *held* that the title was too doubtful to be forced on a purchaser: *In re Thackwray and Young* (1888), 40 Ch. D. 34.

(4) A railway company sold a plot of land which was found not to be required for the purposes of their undertaking. The conveyance to the purchaser contained a covenant by him to resell a strip of ten feet in width to the company whenever he might be required by them to do so. The owner of adjoining land brought an action to recover possession of the whole of the plot sold by the company, on the ground that it was superfluous. It was *held* that the covenant did not affect the validity of the sale of the land, but only of the ten-foot strip: *Ray v. Walker*, [1892] 2 Q. B. 88.

(b) Land may be dealt with in the manner which is most advantageous to the promoters so long as they do not infringe the rights of others: *e.g.*, they may prevent the acquisition by others of easements over the land or let it temporarily.

Illustrations.

(1) A railway company having constructed a tunnel on their own land, thereby diverting the subterranean water from the plaintiff's land contiguous to the tunnel:—*Held*, that the company were not liable for the diversion of this underground water, the act being done in the ordinary exercise of the rights of ownership of their own land: *Galgay v. Great Southern and Western Ry.* (1854), 4 Ir. C. L. R. 456.

(2) Under certain Acts a lake was formed as a reservoir on land conveyed to a navigation company. The Acts reserved to the former owners of the land the right of fishing in the waters and using pleasure boats on the lake. The property and rights of the navigation company having become vested in a railway company, it was *held* (Erle, J., dissenting) that the railway company could not let out boats for hire on the lake or use it for any other purpose than the supplying of water: *Bostock v. North Staffordshire Ry.* (1855), 4 El. & Bl. 798.

NOTE.—Compare, however, the decision in *Foster v. London, Chatham and Dover Ry.*, *infra*.

(3) Certain windows in a house overlooked land belonging to a railway company and used as a goods yard. Sixteen years after the building of the house the company erected a screen opposite the windows to prevent the acquisition of an easement of light and air. It was *held* that the company were entitled to prevent the acquisition of prescriptive rights for windows looking on their land, and had the same powers in the matter as a private owner: *Bonner v. Great Western Ry.* (1883), 24 Ch. D. 1.

(4) A railway company purchased under the powers of their Act a piece of land with a stable on it. Under the general words in the conveyance a right of way to the stable passed to the company. It was *held* that the fact that the stable had been acquired by the company for the purposes of their undertaking did not preclude them from claiming the right of way as long as the stable was used as such, and that they might use it as such until it was required for the purposes of their undertaking or sold as superfluous land: *Bailey v. Great Western Ry.* (1884), 26 Ch. D. 434.

(5) A railway company under their compulsory powers acquired land on which they constructed a railway carried over a series of arches. They then let the interiors of the arches for use as shops upon short tenancies. In an action brought by an adjoining owner against the company, he contended that the company had no right to let the arches for business purposes; but the Court of Appeal *held* that such a letting of the arches was not inconsistent with the purposes for which the company was constituted: *Foster v. London, Chatham and Dover Ry.*, [1895] 1 Q. B. 711.

NOTE.—In this case the view of Malins, V.-C., in *Norton v. London and North-Western Ry.* (1878), 9 Ch. D. 623 (affirmed on another ground in 13 Ch. D. 268, *ante*, p. 694), that a railway company has no right to erect hoardings to prevent prescriptive rights being acquired for windows looking across the line of railway, was disapproved (see also *Bonner v. Great Western Ry.*, *supra*).

(6) A railway company had purchased part of an estate which was being developed for building purposes. A small portion not immediately required by the company was let at 10s. a year, subject to short notice, for the erection of a chapel:—*Held*, following *Foster v. London, Chatham and Dover Ry.* (*ante*), that it was a reasonable and proper use of the land: *Ouslow v. Manchester, Sheffield and Lincolnshire Ry.* (1895). 64 L. J. Ch. 355.

(7) A railway company gave notice to treat for a portion of certain property (they being entitled to do so under their special Act without being obliged to take the whole), and before the arbitrator appointed to assess compensation they undertook to provide access to the remainder of the property by means of a right of way over the portion taken:—*Held* that, as the giving of the proposed right of way was not inconsistent with the purposes for which the lands were taken, the company had power to grant it: *In re Gonty and Manchester, Sheffield and Lincolnshire Ry.*, [1896] 2 Q. B. 439.

NOTE.—The following cases illustrate the rights of railway and other companies as riparian owners.

Illustrations to Note.

(1) Upon an information against a railway company to restrain them from pumping water for the use of a station in large quantities, it was *held*, by Romilly, M.R., that the ordinary right of a riparian owner is to take so much water as he requires for domestic or like purposes, but the fact that a railway company does not require water for such purposes will not entitle them to take it for other purposes, such as the supply of locomotives: *Att.-Gen. v. Great Eastern Ry.* (1870), 18 W. R. 1187 (cf. *Sandwich (Earl) v. Great Northern Ry.*, *infra*).

(2) The W. Canal Co. were authorised by their Act (*inter alia*) to take water from certain streams. The company purchased a mill on one of these streams, and the right of the vendor to the use of the water was conveyed to them. The S. Waterworks Co. formed a reservoir higher up the stream and abstracted water for their purposes:—*Held*, that the W. Company were, like any other riparian owners, entitled to the accustomed flow of water subject to rights of other riparian owners higher up the stream; that the use of the water by the S. Company was not reasonable; and that the W. Company were entitled in equity to an injunction restraining the S. Company from diverting the stream so as to interfere with the supply of water to the canal: *Swindon Waterworks v. Wilts and Berks Canal* (1875), L. R. 7 H. L. 697.

(3) For a number of years a railway company had taken large and continuous quantities of water from the river Ouse, which supplied the plaintiffs' mill, situated at a lower point on the river, for the purpose of supplying their engines and a station at H. They also sank a well and connected it with the river, so as to convey water into the well. Evidence was given that, even in dry weather, the mill would not be stopped for more than a few

minutes a day in consequence of the abstraction of water, and that the level of the river would be reduced only about one-fifth of an inch :—*Held*, that the company, as riparian owners, were entitled to take a reasonable quantity of water for their own purposes, and that in this case the quantity taken had been reasonable : *Sandwich (Earl) v. Great Northern Ry.* (1878), 10 Ch. D. 707.

(c) A purchaser of superfluous lands takes no better title than the promoters had.

Illustrations.

(1) The B. and N. Railway Co. sold some superfluous land and purported to convey to the purchaser without consideration a right of way under an arch leading to part of the land sold, but not being a way of necessity. By the B. and N. Railway Act the M. Railway Co. were to enter into an agreement to manage, work and use the railway and works; and in pursuance of that arrangement they required the arch as a closed yard for loading purposes. An action to restrain the M. Railway Co. from interfering with the right of way was dismissed on the ground that the alienation of the right of way was *ultra vires*, and that the purchaser must be taken to have had notice of the rights of the M. Railway Co., whose title arising under the Act was prior to his own : *Mulliner v. Midland Ry.* (1879), 11 Ch. D. 611.

(2) A railway company took the surface of land without the minerals by virtue of their statutory powers. Part of such land was subsequently sold by them as superfluous. The minerals were worked in the manner usual in the district, and thereby a subsidence was caused which damaged houses on the land so sold. It was *held* that the purchaser of the land could have no greater right of support than the railway company had : *Pountney v. Clayton* (1883), 11 Q. B. D. 820.

(3) An inclosure Act provided that no buildings should be erected on certain land at B. A railway company acquired a portion of the land under their statutory powers, and sold part which became superfluous. Buildings were subsequently commenced on the part so sold. An injunction to restrain the erection of the buildings in contravention of the provisions of the inclosure Act was granted at the suit of an adjoining owner, on the ground that the land acquired by the company was freed from the prohibition as to building for the purposes of their undertaking alone, and that when part was sold as superfluous land the prohibition revived in respect of that part : *Bird v. Eggleton* (1885), 29 Ch. D. 1012.

(4) The L. Railway Co. sold to M. a piece of their surplus land adjacent to their line. M. had already, with the company's permission, erected a house on the land. The conveyance to M. contained a grant of or covenant as to light, but recited that all the rest of the adjoining land in their possession would be required for the construction of the railway. The railway was carried on a viaduct over arches, two of which were opposite M.'s house, and distant about eight feet from it. C.'s predecessor in title purchased from the company land opposite M.'s house on the other side of the railway, and took a lease for a thousand years of the arches. C.'s conveyance was subject to any right of light M. might be entitled to. C. blocked up the arches with hoardings and thereby interfered with the access of light to M.'s house :—*Held*, that the company had entered into an implied obligation not to do anything on the adjoining land to interfere with M.'s enjoyment of the land sold except that which was necessarily required for the construction of the railway; that the hoarding did not come under the exception; and that an injunction for its removal should go : *Myers v. Catterson* (1889), 43 Ch. D. 470.

(d) A title to land even not superfluous, and whether lying laterally to

the company's works or over a tunnel, may be obtained against promoters by adverse possession.

Illustrations.

(1) Land near a railway station was used as a wharf by a coal merchant who had exclusive adverse possession of it for more than twelve years against the railway company, who were the original owners. The land was not superfluous, and was, in fact, required for the purposes of a siding : but it was *held* that these facts did not of themselves prevent the occupier becoming entitled to the land under the Statutes of Limitation : *Bobbett v. South-Eastern Ry.* (1882), 9 Q. B. D. 424.

(2) "I think, further, it is established . . . that a title may be acquired by possession by a stranger to land of a railway company, even though not superfluous land, and therefore land which the railway company could not sell or dispose of. . . . It is true that the cases establishing the proposition I have last mentioned, having reference to railway companies, deal with land situated laterally with regard to the companies' works, and not to land over a tunnel. . . . It is sufficient for the purposes of the present case to say that I consider that the defendant and his predecessors in title have acquired by possession title to the surface of the land, with so much of what is beneath as is necessary for the enjoyment of it, subject to the right of the plaintiffs to the tunnel and to so much of the underlying and superincumbent strata as is necessary for its due and proper enjoyment as and for a tunnel" : *per* Byrne, J., in *Midland Ry. v. Wright*, [1901] 1 Ch. at pp. 743—744.

(e) A purchaser of superfluous lands may be bound not to make objections or requisitions as to the right of the promoters to sell such land as superfluous land or as to the waiver of pre-emption, and on default of completion may lose his deposit.

Illustrations.

(1) The owner of land which had been purchased from a railway company as superfluous contracted to sell it, under a condition that the purchaser should assume and admit that everything (if anything was necessary) was done by the company to enable them to sell the land as superfluous, and should not call for or require production of any evidence to that effect. The purchaser discovered that prior owners of the land had not waived their right of pre-emption, but he was *held* to be bound by the condition of sale : *Best v. Hamand* (1879), 12 Ch. D. 1.

(2) The defendant contracted to sell to the plaintiff certain land situate over a tunnel, which, not being "superfluous land," the railway company from whom the defendant had purchased it had no power to sell. The contract was for the sale of "freehold building land" ; and it was stipulated that no objection or requisition should be made in respect of the conveyance by the company to the defendant. The plaintiff declined to complete :—*Held*, that the deposit paid by the plaintiff could not be recovered : *Rosenberg v. Cook* (1881), 8 Q. B. D. 162. "It is suggested that because the company have no statutory power to convey, therefore no title can be acquired from them. But that is not the effect of the statute. There is nothing in the statute to the effect that the land shall not be devoted to any other purpose than that of a railway or that possession cannot be taken from a railway company. The simple fact is that the vendor had a possession in this case, so that a fair sale of that possession is perfectly good" : *per* Jessel, M.R., at p. 165, *ib.*

(f) Lessees of superfluous lands are estopped from disputing the title of the promoters, *i.e.*, of their lessor.

Illustration.

After the expiration of the ten years' period land taken by a railway company was let to a tenant. No claim was made by the adjoining owner. The company brought an action of ejectment against the tenant. It was *held* that the tenant was estopped from disputing the company's title by alleging that the land was vested in the adjoining owner : *London and North-Western Ry. v. West* (1867), L. R. 2 C. P. 553.

VI. Vesting of superfluous lands in adjoining owners.

(a) The vesting of superfluous lands in the adjoining owners takes place by force of a conditional limitation, and not of a forfeiture.

Illustration.

The defendants under their statutory powers acquired certain lands for the purpose of their undertaking. Part of the land became superfluous land within sect. 127 :—*Held*, that the defendants did not acquire the estate in this land subject to a condition that on a specified event their estate should be forfeited, but that the effect of sect. 127 was that they acquired a statutory title to the land for the purpose of their undertaking, with a limitation over as to any superfluous portion vesting it in the adjoining owners ; and therefore that the defendants, in an action by an adjoining owner to establish title to superfluous land, were not entitled to claim exemption from discovery which they had claimed, on the ground that discovery might disclose facts in consequence of which the land might become forfeited : *Miller v. Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421.

(b) Difficulties as to vesting must be determined by the Court.

Illustrations.

(1) A wall had been built by agreement entered into between a landowner and a railway company for the purpose of dividing their lands. The company's land had been acquired for the purposes of the railway. The agreement provided that the land on which the wall stood should be the joint property of the landowner and the company. It was *held* that this provision did not affect the landowner so as to prevent him from claiming to be an adjoining owner : *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610.

(2) "A contest might arise in some cases as to who is an owner of land adjoining a railway. The question might also arise : Is every part of the property of a man who is an owner of land adjoining a railway to entitle him to a share, or only the particular part immediately adjoining the railway, and not any part which, after you have passed the hedge or other boundary of the railway, is behind a farther hedge? Or the questions might arise : What is to be done with regard to infants? What is to be done with regard to married women? and the like. And what is to be done with regard to partition between the several parties who are interested? All that the Legislature has entirely passed by" : *per* Lord Hatherley in *Great Western Ry. v. May* (1874), L. R. 7 H. L. at p. 303.

(3) Commonable lands were enclosed under an award pursuant to a local Act passed subsequently to 41 Geo. III. c. 109. By the award the soil of the roads running between the allotments remained vested in the lord of the manor. Bramwell and Brett, L.JJ., considered that if the land upon one side of a road became superfluous it would vest in the lord of the manor, for the right to the grass and herbage arising upon the road under 41 Geo. III. c. 109, s. 11, was insufficient to render the owner of the close on the other side of the road an adjoining owner : *Hooper v. Bourne* (1877), 3 Q. B. D. 258.

(c) Who are adjoining owners (*see* sect. 128, *post*).

(d) Different principles appear to have been adopted in different cases for apportioning unsold superfluous lands among adjoining owners in proportion to the extent of their lands adjoining the superfluous lands.

Illustrations.

(1) In 1866 the Court of Exchequer Chamber said : " Where there are several adjoining properties in contact with the superfluous land in question, we think it should be divided among the owners of such adjoining properties in proportion to the frontage of each ; and by frontage we mean what would be the length of the line of contact of each property if such line was made straight from the point of intersection of the boundaries on one side to the point of intersection of the two boundaries on the other side " : *Moody v. Corbett* (1866), L. R. 1 Q. B. 510 ; and reference may be made to the plan facing p. 516 of the report.

(2) In 1868 the Court of Exchequer said : " The land may be shortly described as a long strip, crossed at right angles by the intended line. The plaintiff is owner of the adjoining land on one side of the strip ; the defendant of that on the other. He is as much an adjoining owner, therefore as the plaintiff, and it seems to us that all the plaintiff is entitled to is so much as lies on his side of a line drawn from the point where his land and the defendant's and the end of the strip meet, along the length of the strip to a similar point at the other end " : *Smith v. Smith* (1868), L. R. 3 Ex. at p. 287 ; in which case *Moody v. Corbett* (*supra*) was cited.

Lands to be offered to Owner of Lands from which they were originally taken or to adjoining Owner

128. Before the Promoters of the Undertaking dispose of any such superfluous Lands they shall, unless such Lands be situate within a Town, or be Lands built upon or used for Building Purposes, first offer to sell the same to the Person then entitled to the Lands (if any) from which the same were originally severed ; or if such Person refuse to purchase the same, or cannot after diligent Inquiry be found, then the like Offer shall be made to the Person or to the several Persons whose Lands shall immediately adjoin the Lands so proposed to be sold, such Persons being capable of entering into a Contract for the Purchase of such Lands ; and where more than One such Person shall be entitled to such Right of Pre-emption such Offer shall be made to such Persons in succession, one after another, in such Order as the Promoters of the Undertaking shall think fit.

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I. Object of the section.

The object of the section is to give to certain persons who are specified a right of pre-emption in superfluous lands (with some exceptions) before they are disposed of by the promoters of the undertaking.

NOTE.—This right to pre-emption may be taken away or limited by the special Act.

Illustration.

The H. A. Company were empowered by their Act to dispose of part of the lands which they were authorised to purchase, provided they should first offer the same to the person or persons of whom the same had been purchased. It was *held* that the right of pre-emption was limited to the actual vendors to the company and did not extend to their successors in title: *Highgate Archway v. Seakes* (1871), L. R. 12 Eq. 9.

II. Over what lands a right of pre-emption is given.

(a) A right of pre-emption is given over superfluous lands *except* those set out under heading (b).

(i.) As to what constitutes superfluous land, *see* under sect. 127.

(ii.) A conveyance of land does not of *necessity* make it superfluous.

Illustration.

In 1875 the M. Railway took for the purposes of their undertaking land which in 1879 they conveyed to the S. B. Company. The owner of the land from which the land taken by the M. Railway was originally severed claimed to have the land conveyed to him on the ground that it had been sold as superfluous land. It was *held* that the fact of the conveyance to the S. B. Company was not sufficient to show that the land was superfluous, it appearing that the land would not have been superfluous had it remained in the hands of the M. Railway, and that therefore the landowner's right of pre-emption had not arisen.

But the conveyance to the S. B. Company was set aside : *Hobbs v. Midland Ry.* (1882), 20 Ch. D. 418.

(b) No right of pre-emption is given with regard to the following classes of superfluous lands :—

- (i.) Lands situate within a town. The word “town” is here used in its popular, and not in its legal sense (see *ante*, sect. 93, p. 630).
- (ii.) Lands built upon or used for building purposes. The words “built upon” mean with continuous buildings, and the words “used for building purposes” mean actually built upon or laid out to be so used, and not merely contemplated or intended to be so used or suitable for the purpose of building.

Illustrations.

(1) “I think that what the Act meant was this : where the houses are actually laid out, where the land has been sold as building land, or let upon building leases, though the houses are not actually built—that is what I think is meant by the words ‘or used for building purposes’; the land must be either built upon or actually laid out to be used for building purposes” : *per* Lord Romilly, M.R., in *Coventry v. London, Brighton and South Coast Ry.* (1867), L. R. 5 Eq. at p. 109.

(2) Land situate within the boundary of a borough, but outside the congeries of buildings forming the town, is not “land in a town,” nor “land built upon or used for building purposes,” within the meaning of sect. 128 of the Lands Clauses Act, even if there are isolated buildings situated thereon : *Carington (Lord) v. Wycombe Ry.* (1868), L. R. 3 Ch. 377. “The words ‘built upon’ must mean to describe something which, though it cannot be called land in a town or part of a town, is land covered with continuous buildings *eodem modo* as the *solum* of the town. The Legislature cannot have meant that because a piece of land in the open country has a building upon it it is ‘land built upon’ within the meaning of this section. . . . What the Act of Parliament requires, in order to bring the case within the exception, would be not that it should be capable of being used as building ground, but that it actually and *de facto* should be land used for building purposes” : *per* Cairns, L.J., at p. 384, *ib.*

(3) “It is not because you think that certain land might be applicable for building purposes, and may be very suitable for those purposes and may be sold for those purposes, that it comes within either the meaning or the spirit of the words ‘land used for building purposes,’ by which, I apprehend, is meant land actually used for building purposes, not land contemplated to be used for building purposes, or intended to be used for building purposes, or thoroughly suitable for building purposes” : *per* Lord Hatherley, L.C., in *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. at p. 617.

III. When the right of pre-emption arises.

The right exists before the promoters dispose of such lands, and arises on an attempt to dispose of them.

(a) “Dispose” means the transfer of the land to some other person, and not its use for a different purpose by the promoters.

Illustrations.

(1) A railway company purchased certain land for the purpose of constructing a branch line. Before the expiration of the ten years mentioned in sect. 127 the company abandoned the scheme, but they proposed to use the land for the purpose of another line, and brought a Bill into Parliament to obtain the necessary powers. The vendor of the land filed a bill asking for a reconveyance of the land as "superfluous." The bill was dismissed on demurrer for want of equity. It was *held* that the words "dispose of" meant transfer to other persons, and not the user of the land for a different purpose from that intended: *Astley v. Manchester, Sheffield and Lincolnshire Ry.* (1858), 27 L. J. Ch. 478. "It has been argued that there is . . . a peculiar equity which grows out of these circumstances and entitles the party to insist that the promoters of the undertaking are, in point of fact, disposing of the superfluous lands. . . . It seems to me that this construction of the word 'dispose' cannot be maintained. The Act clearly contemplates by the use of the word the transfer of the land to some other person, not the application of it by the company to a different purpose": *per* Chelmsford, L.C., at p. 481, *ib.*

(2) A railway company took land under compulsory powers, and about two years afterwards conveyed part of it to a purchaser by a deed which recited that it was superfluous land. It was *held* that, although ten years had not elapsed from the expiration of the time limited for the completion of the works, the original owners of the land could exercise their right of pre-emption: *Carington (Lord) v. Wycombe Ry.* (1868), L. R. 3 Ch. 377.

(3) A railway company sold some land acquired, but not used, for the purposes of their railway, describing it as "surplus land." It was *held* that this was tantamount to a declaration that the land was superfluous land, and that the right of an adjoining owner to claim pre-emption arose on such attempt to sell, although ten years had not elapsed from the time limited for the completion of the works: *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610.

(4) A railway company sold land which it had acquired to another railway company, which had no statutory powers to purchase the land in question. It was to be used for the exchange of traffic, and if retained by the first company would not have been "superfluous land." In an action brought by an adjoining owner to establish his right of pre-emption it was *held* that the sale by the company was *ultra vires* and must be set aside: *Hobbs v. Midland Ry.* (1882), 20 Ch. D. 418.

(b) Land is not "disposed of" by its application by the promoters to the purposes of another authorised undertaking.

Illustration.

A railway company took land for the purposes of a branch railway, but allowed their powers to expire without making it. Before the expiration of the time for disposing of their superfluous lands they promoted a Bill for another branch, and entered on some of the same land to begin the formation of the line. It was *held* that the landowner's right of pre-emption had not arisen, and that the abandonment of the branch for which the land was originally taken gave him no right to a conveyance: *Astley v. Manchester, Sheffield and Lincolnshire Ry.* (1858), 2 De G. & J. 453.

(c) Land is not "disposed of" when taken compulsorily by the promoters of another undertaking.

Illustration.

The N. E. Railway acquired for the purposes of their undertaking fifty-seven acres of land near the town of G. Before the expiration of the time limited for the exercise

of their power of selling superfluous lands, seven acres of the land were taken by the L. and Y. Railway under their compulsory powers. The successor in title of the vendors to the N. E. Railway claimed that the seven acres were superfluous lands of that company, and ought to have been offered to him before being sold to the L. and Y. Railway. It was *held* that the compulsory sale to the last-named company afforded no ground for inferring that the seven acres were superfluous land, and accordingly that no right of pre-emption had arisen: *Dunhill v. North-Eastern Ry.*, [1896] 1 Ch. 121.

(d) Land may be deemed “disposed of” within the meaning of the section by its dedication by the promoters to public purposes which are not purposes of the undertaking.

Illustration.

A railway company turned a strip of land acquired by them under their compulsory powers into a road to provide a communication which they were obliged to make between certain severed lands. The original owner of the strip, before the period named for the sale of superfluous lands had arrived, claimed a right of pre-emption. It was *held* that, though the strip was not superfluous land, the action was not premature, as the permanent dedication of the strip for the purpose of a road would have established it to be superfluous, if the making of the road had not been one of the purposes of the undertaking: *Beauchamp (Earl) v. Great Western Ry.* (1868), L. R. 3 Ch. 745.

(e) Negotiations falling short of a contract do not (probably) amount to “disposing of” land.

Illustration.

The directors of a railway company, before the expiration of ten years from the time limited for completion of the works, considered proposals for the purchase from the company of land adjoining a terminus; and after the ten years had expired they considered further proposals, and leased part of the land for the building of a district post-office. The adjoining owner claimed the land. It was *held* that the question whether or not the land had become superfluous was a question of mixed law and fact, and that on the evidence the land was not superfluous: *Macfie v. Cullander and Oban Ry.*, [1898] A. C. 270.

(f) As against a purchaser a contract for the sale of superfluous land is good where the offer directed by this section is made after the execution of the contract and is declined.

Illustration.

A railway company whose Act contained a section similar to sect. 128 of the Lands Clauses Act put up superfluous land for sale without making any offer to sell the same to the adjoining owners. The purchaser objected to the title on this ground, and the company then made an offer to the adjoining owners, which was declined. The purchaser persisting in his objection, it was *held* that the circumstance that the offer had not been made at the time of the sale did not prevent the company from contracting, though it might have prevented their conveying the land; and as by their subsequent offer they had a right to enforce the contract, specific performance was decreed, but without costs: *London and Greenwich Ry. v. Goodchild* (1844), 3 Rail. Cas. 507.

(g) A purchaser may be prevented by his agreement with the vendors from objecting that the right of pre-emption has not been duly waived by the adjacent owners.

Illustration.

A railway company sold surplus land to H. H. resold to B. by a conveyance which made the conveyance from the company the root of title, and stipulated that B. should "assume and admit that everything (if anything were necessary) was done and performed by the company to enable them to sell and effectually convey the said pieces of land as superfluous lands, and shall not call for or require production of any evidence to this effect, or of the identity of the land with that described in the conveyance"; and further, that if B. failed to comply with the terms of the agreement, the deposit was to be forfeited. B. discovered that the adjoining landowner had not waived his right of pre-emption. B. required H. to remedy the defect in the title, and on H.'s refusal brought an action to recover the deposit and damages. H. then sold to the adjoining owner:—*Held*, that B. had broken the contract by refusing to abide by his stipulation to admit the title of the company to sell to H., and that he could not claim damages or the return of the deposit: *Best v. Hamand* (1879), 12 Ch. D. 1.

IV. To whom the right of pre-emption is given by the section.

The right of pre-emption is given in order to the following:—

(a) The person who is the owner of the land from which the land was originally severed if after reasonable diligence he can be found.

Illustrations.

(1) "Under the Lands Clauses Consolidation Act 1845, s. 128, before superfluous lands can be disposed of they are to be offered to the person then entitled to the lands from which they were originally severed. The plaintiffs were in 1863 the owners of the lands upon the north-west side of the railway, from which the land sought to be recovered was originally severed, and it has been argued that because they would have been entitled to the right of pre-emption the plaintiffs are adjoining owners of the lands in dispute. That is an argument to which I cannot assent": *per* Bramwell, L.J., in *Hooper v. Bourne* (1877), 3 Q. B. D. at p. 278. And *see* note on p. 708, *post*.

(2) "Who is the person designated in the Act as the person to whom the offer is to be made? He must be 'the person then entitled to the lands from which the same [the superfluous lands] were originally severed.' I think myself that there is a very plain and obvious distinction between the person who is mentioned in the 127th section as the person who is entitled at the expiration of the prescribed period and the person mentioned in the 128th section. . . . It seems from the language used, and it is plain enough, that by the 128th section the land in question must be offered to that person who is the owner of the land from which the particular land was originally severed": *per* Manisty, J., in *Hobbs v. Midland Ry.* (1882), 20 Ch. D. at p. 428.

(b) The persons whose lands immediately adjoin the lands proposed to be sold.

(i.) All adjoining owners are on the same footing, and an inquiry may be directed to ascertain who they are.

Illustration.

An adjoining owner claimed a right of pre-emption of lands which a railway company was about to sell, but which had never been his property or part of his estate. It was

held that the land must be first offered to persons whose lands or some of them had been taken by the company under their powers, or who were owners of the lands adjoining the land proposed to be sold; and an inquiry was directed whether there was any other adjoining owner who was equally entitled with the claimant to make such claim: *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610.

NOTE.—The fact that a person has a right of pre-emption does not necessarily make him an “adjoining owner” (see *Hooper v. Bourne, supra*; and sect. 127, *ante*).

- (ii.) A lessee for a long term of years may be a person “whose lands immediately adjoin.”

Illustration.

A railway company advertised for sale a triangular piece of land which, before they acquired it, had been part of Wandsworth Common, and was bounded on one side by the railway, on another side by a public road, and on another partly by land in the occupation of a lessee for a long term of years, and partly by a private road which separated it from three strips of land in the occupation of other lessees for long terms. It was *held* that all the lessees had rights of pre-emption, and that it was immaterial that the private road (the exclusive right of user of which was vested in the lessees) separated the land of some of them from the land which the railway company proposed to sell as superfluous: *Coventry v. London, Brighton and South Coast Ry.* (1867), L. R. 5 Eq. 104.

- (iii.) The adjoining owner is *primâ facie* the person in whom the soil is vested.

Illustrations.

(1) A wall was built by agreement on land dividing the property of an individual from that of a railway company, and the company and the individual were, by the same agreement, the joint owners of the land on which the wall was built. This circumstance did not prevent the individual from being an “adjoining owner” within the meaning of sect. 128: *London and South-Western Ry. v. Blackmore* (1870), L. R. 4 H. L. 610.

(2) Commonable lands were enclosed under an award, by which the soil of the roads running between the allotments remained vested in the lord of the manor. It was *held* that the proprietor of a close upon one side of a road was not an adjoining owner with regard to a close on the other side; for the right to the grass and herbage arising upon the road, under 41 Geo. III. c. 109, s. 11, was insufficient to render the proprietor of the close an adjoining owner, the soil of the road not being vested in him: *Hooper v. Bourne* (1878), 3 Q. B. D. 258; and 5 App. Cas. 1.

Right of Pre-emption to be claimed within Six Weeks.

129. If any such Persons be desirous of purchasing such Lands, then within Six Weeks after such Offer of Sale they shall signify their

Desire in that Behalf to the Promoters of the Undertaking, or if they decline such Offer, or if for Six Weeks they neglect to signify their Desire to purchase such Lands, the Right of Pre-emption of every such Person so declining or neglecting in respect of the Lands included in such Offer shall cease; and a Declaration in Writing made before a Justice by some

Person not interested in the Matter in question, stating that such Offer was made and was refused, or not accepted within Six Weeks from the Time of making the same, or that the Person or all the Persons entitled to the Right of Pre-emption were out of the Country, or could not after diligent Inquiry be found, or were not capable of entering into a Contract for the Purchase of such Lands, shall in all Courts be sufficient Evidence of the Facts therein stated.

Object of the section.

This section limits the time within which the right of pre-emption over superfluous lands is to be claimed, and provides that a declaration by some disinterested person shall be evidence of the facts which show that the right cannot be exercised.

Differences as to
Price to be settled
by Arbitration.

130. If any Person entitled to such Pre-emption be desirous of purchasing any such Lands, and such Person and the Promoters of the Undertaking do not agree as to the Price thereof, then such Price shall be ascertained by Arbitration, and the Costs of such Arbitration shall be in the Discretion of the Arbitrators.

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I. The sections of the Act which relate to arbitrations in cases of disputed compensation do not apply to arbitrations under this section.

Illustrations.

(1) Superfluous land was purchased by the person who had the right of pre-emption. There was a reference to arbitration as to value, and the umpire, after fixing the price, directed either party to pay his own costs of the arbitration. It was *held* that the question of costs was to be decided in the same way as if the purchaser had bought the land of another company, and that the umpire's decision was right: *In re Eyre's Trusts* [1869] W. N. 76.

(2) An arbitrator appointed under the provisions of the Lands Clauses Act made an award ascertaining the price of superfluous lands of a railway company. The company refused to take up the award, and an application for a *mandamus* to compel them to do so

was refused, it being suggested that the purchaser could take up the award himself and, if he thought fit, bring an action upon it : *Jones v. South Staffordshire Ry.* (1869), 19 L. T. 603. "The arbitration clauses all seem to point to cases of compensation for lands taken by the company. Here it is the land of the company which another person wishes to buy. The position of the parties is changed. In the one case the company take the land and give compensation ; in the other case, the company having the land, another person comes and claims to buy. I can well see why there should be different provisions to meet each of these two states of things" : *per* Cockburn, C.J., at p. 604, *ib.*

II. Sect. 1 (1) of the Lands Clauses (Taxation of Costs) Act, 1895, also only applies to cases of disputed compensation.

III. Inasmuch as the sections of the Act relating to arbitrations do not apply, it would seem that arbitrations under this section (130) are entirely regulated by the Arbitration Act, 1889.

131. Upon Payment or Tender to the Promoters of the Undertaking of the Purchase Money so agreed upon or determined as aforesaid they shall convey such Lands to the Purchasers thereof by Deed under the Common Seal of the Promoters of the Undertaking, if they be a Corporation, or if not a Corporation under the Hands and Seals of the Promoters of the Undertaking or any Two of the Directors or Managers thereof acting by the Authority of the Body ; and a Deed so executed shall be effectual to vest the Lands comprised therein in the Purchaser of such Lands for the Estate which shall so have been purchased by him ; and a Receipt under such Common Seal, or under the Hands of Two of the Directors or Managers of the Undertaking as aforesaid, shall be a sufficient Discharge to the Purchaser of any such Lands for the Purchase Money in such Receipt expressed to be received.

Lands to be conveyed to the Purchasers.

132. In every Conveyance of Lands to be made by the Promoters of the Undertaking under this or the Special Act the Word "grant" shall operate as express Covenants by the Promoters of the Undertaking, for themselves and their Successors, or for themselves, their Heirs, Executors, Administrators, and Assigns, as the Case may be, with the respective Grantees therein named, and the Successors, Heirs, Executors, Administrators, and Assigns of such Grantees, according to the Quality

Effect of the Word "grant" in Conveyances.

or Nature of such Grants, and of the Estate or Interest therein expressed to be thereby conveyed, as follows, except so far as the same shall be restrained or limited by express Words contained in any such Conveyance ; (that is to say,)

A Covenant that, notwithstanding any Act or Default done by the Promoters of the Undertaking, they were at the Time of the Execution of such Conveyance seised or possessed of the Lands or Premises thereby granted for an indefeasible Estate of Inheritance in Fee Simple, free from all Incumbrances done or occasioned by them, or otherwise for such Estate or Interest as therein expressed to be thereby granted, free from Incumbrances done or occasioned by them :

A Covenant that the Grantee of such Lands, his Heirs, Successors, Executors, Administrators, and Assigns, (as the Case may be,) shall quietly enjoy the same against the Promoters of the Undertaking, and their Successors, and all other Persons claiming under them, and be indemnified and saved harmless by the Promoters of the Undertaking and their Successors, from all Incumbrances created by the Promoters of the Undertaking :

A Covenant for further Assurance of such Lands, at the Expense of such Grantee, his Heirs, Successors, Executors, Administrators, or Assigns, (as the Case may be,) by the Promoters of the Undertaking, or their Successors, and all other Persons claiming under them :

And all such Grantees, and their several Successors, Heirs, Executors, Administrators, and Assigns respectively, according to their respective Quality or Nature, and the Estate or Interest in such Conveyance expressed to be conveyed, may in all Actions brought by them, assign Breaches of Covenants, as they might do if such Covenants were expressly inserted in such Conveyances.

The importance of these two sections is, of course, much diminished by the operation of the Conveyancing and Law of Property Act, 1881.

Illustration.

The L. School Board under their compulsory powers served notice to treat on P. for certain lands "with the appurtenances." A conveyance was tendered to P. whereby he purported to convey as beneficial owner, and in which a way of convenience which had been exercised by P.'s tenants and others over other lands of P. was not mentioned. P. complained that the effect of sect. 6 of the Conveyancing Act, 1881, would be to convey to the Board a right of way over this land, and required limiting words to be inserted in the conveyance :—*Held*, that the form of conveyance should be such as to exclude the words "reputed to appertain" or "enjoyed with or reputed or known as part" of the lands in question : *In re Peck and the London School Board*, [1893] 2 Ch. 315.

Land Tax and
Poor's Rate to be
made good.

133. And be it enacted, That if the Promoters of the Undertaking become possessed by virtue of this or the Special Act, or any Act incorporated therewith, of any Lands charged with the Land Tax, or liable to be assessed to the Poor's Rate, they shall from Time to Time, until the Works shall be completed and assessed to such Land Tax or Poor's Rate, be liable to make good the Deficiency in the several Assessments for Land Tax and Poor's Rate by reason of such Lands having been taken or used for the Purposes of the Works, and such Deficiency shall be computed according to the Rental at which such Lands, with any Building thereon, were valued or rated at the Time of the passing of the Special Act; and on Demand of such Deficiency the Promoters of the Undertaking, or their Treasurer, shall pay all such Deficiencies to the Collector of the said Assessments respectively; nevertheless, if at any Time the Promoters of the Undertaking think fit to redeem such Land Tax, they may do so in accordance with the Powers in that Behalf given by the Acts for the Redemption of the Land Tax.

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I. Object and scheme of the section.

This section provides that where lands subject to land tax or poor's rate are taken for the purposes of the undertaking, the promoters shall make good the deficiency in the assessments until the works are completed and assessed to land tax or poor's rate.

Illustration.

"The scheme of the section is to create a parochial indemnity during the execution of the works": *per* Bowen, L.J., in *Putney Overseers v. London and South-Western Ry.*, [1891] 1 Q. B. at p. 443.

II. Who are promoters.

Public bodies and local authorities are promoters within the meaning of this section.

Illustrations.

(1) The Holborn Valley Improvement Act, 1864, incorporated sect. 133 of the Lands Clauses Act and empowered the Corporation of London to take land for the purpose of constructing the Holborn Viaduct. The Corporation were held to be promoters within the meaning of sect. 133: *London Corporation v. St. Andrew's, Holborn* (1867), L. R. 2 C. P. 574.

(2) The M. Board took land under the provisions of a special Act which incorporated the Lands Clauses Act. They were *held* liable to make good the deficiency in the poor rate caused during the construction of their works by the acquisition of the land which was rateable: *Wheeler v. Metropolitan Board of Works* (1869), L. R. 4 Ex. 303.

(3) The M. Board took land to form an embankment:—*Held*, that the fact that the works contemplated by the special Act were not such as would be assessable to poor's rate when completed did not prevent the Board being liable under sect. 133: *Stratton v Metropolitan Board of Works* (1874), L. R. 10 C. P. 76.

(4) An urban sanitary authority having the powers of the Lands Clauses Consolidation Acts with respect to the purchase or taking of lands otherwise than by agreement are promoters within this section: *Bristol Guardians v. Bristol Corporation* (1887), 18 Q. B. D. 549.

(5) Under a scheme confirmed by a special Act the L. County Council were clothed with the powers of a local authority under the Housing of the Working Classes Act, 1890. They were treated as promoters within this section: *St. Leonard, Shoreditch (Vestry) v. London County Council*, [1895] 2 Q. B. 104.

III. Meaning of deficiency.

(a) The deficiency is determined from the difference between the rateable value at the time of the special Act and the rateable value at the time when it is sought to ascertain the deficiency.

Illustrations.

(1) Land and houses were taken by promoters who were rated at 7*d.* in the pound upon the rental value of the land and houses appearing in the poor rate in existence at the

time of the passing of the special Act. It was *held* that the promoters were not liable under sect. 133 to be rated to the relief of the poor in respect of such lands, but only to make good the deficiency : *London Corporation v. St. Andrew's, Holborn* (1867), L. R. 2 C. P. 574.

(2) "What the clause means is, that the Board shall stand in the place of the occupiers of the demolished houses and pay what they would have paid upon each assessment if the houses had not been taken and they had continued assessed at the rateable value which they bore in the assessment at the time the Act passed. The amount payable by the Board is therefore what the parish lost upon each assessment. The period during which they are to make this compensation to the parish is, until the works shall be completed": *per* Denman, J., delivering the judgment of the Court in *Stratton v. Metropolitan Board of Works* (1874), L. R. 10 C. P. at p. 87.

(3) Lord Esher, M.R., explains how the deficiency should be ascertained in the case of promoters purchasing lands for the making of streets with an obligation to sell the surplus land after the making of the streets as follows : "Now, here the promoters have undertaken more than the duty of making streets, for they take more land than is wanted for the actual streets. It is not denied that they have undertaken when they have finished the streets to sell that surplus land, and I consider that this sale of surplus land is part of the 'works,' using that term in an enlarged sense, that they have to do. Now, a part of their works can never be assessed, and we must therefore, in accordance with *Stratton v. Metropolitan Board of Works*, L. R. 10 C. P. 76, read the section as though it said, 'until the works are completed, and such part of them as become assessable property are assessed.' The section is directed to ascertain a limit of time, which, in many cases, it would not do unless it is read in this manner. Applying that to the present case, the limit of time will be when the structural parts are finished and the surplus land is all sold and has all become assessable. I incline to agree that as each part of the land is disposed of and becomes assessable, that will from time to time lessen the deficiency in respect of each separate undertaking. The deficiency at any given period would be the whole deficiency created by the taking of the land less what is so obtained, and when these balance, even although there is land still remaining in hand, there is no longer a deficiency, and the liability will cease. If when the street is finished and all the surplus land assessed there should still remain a deficiency, the liability of the promoters is nevertheless ended, because this is not an indemnity, but only a payment of a deficiency for a certain time": *Bristol Guardians v. Bristol Corporation* (1887), 18 Q. B. D. at p. 561.

(b) The deficiency is determined from the assessment, and not by comparison with the amount of rate paid at the time of the special Act ; it is therefore not material whether or not the poor rate was paid by reason of the house being unoccupied or otherwise.

Illustrations.

(1) Some of a number of houses taken by promoters were unoccupied. This fact was *held* immaterial in estimating the amount of the deficiency in poor rate which the promoters had to make good : *Putney Overseers v. London and South-Western Ry.*, [1891] 1 Q. B. 440. "When the deficiency has to be computed it is not to be arrived at by taking the existing assessment and the payment formerly made ; but it is to be computed according to the rental at which the lands were valued or rated at the time of the passing of the special Act. It is not a question of what was paid, but a question of what was assessed. On the one side is the rateable value at the time when it is sought to ascertain the deficiency ; on the other, the rental at which the land was valued or rated at the time of the passing of the special Act, and the comparison between these supplies the measure of the deficiency": *per* Bowen, L.J., at p. 443, *ib.*

(2) The owners of lands taken by promoters had agreed with the rating authority to pay the rates instead of the occupiers, being allowed a deduction of 25 per cent. :—*Held*, that in computing the “deficiency” under this section the promoters could not claim the benefit of this deduction : *St. Leonard, Shoreditch (Vestry) v. London County Council*, [1895] 2 Q. B. 104.

(c) If the land in question was not assessed at the time of the passing of the special Act, the promoters escape liability under this section.

Illustrations.

(1) Land taken by the M. Board of Works for the purposes of the Thames Embankment was at the passing of the special Act in the occupation of the Commissioners of Works, for public purposes as servants of the Crown, and which, although in the valuation lists, had not while in the occupation of the Commissioners been assessed to the poor rate, but had been so assessed before they came into occupation. It was *held* that, as no rates were at the passing of the Act paid in respect of the property occupied by the Commissioners, the Board were not liable for the rateable value of that property : *Stratton v. Metropolitan Board of Works* (1874), L. R. 10 C. P. 76.

(2) Where a railway company acquired land, on which houses had formerly stood, but which had been pulled down before the company acquired the land, and the local authority applied to justices for a distress warrant for rates on the amount at which the former buildings had been assessed, the justices refused, on the ground that when the rate was made no such premises existed as were described in the rate-book :—*Held*, that the justices were right : *St. Stephen, City of London, Churchwardens v. Great Northern and City Ry.* (1902), 86 L. T. 390.

(d) One special Act may authorise several schemes, and in such a case the assessment ought to be calculated on each separate scheme if each scheme constitutes a separate undertaking.

Illustration.

Authority to put in force the compulsory powers of the Lands Clauses Acts was conferred by a provisional order confirmed by an Act which described in one schedule, but under headings separately numbered, several improvement schemes promoted by an urban sanitary authority. It was *held* that each scheme described in the schedule constituted a separate undertaking, and that the deficiency in the assessment ought to be calculated on each separate undertaking within the rating area affected by it : *Bristol Guardians v. Bristol Corporation* (1887), 18 Q. B. D. 549.

IV. Meaning of land tax and poor's rate.

The liability in respect of land tax and poor's rate may extend beyond land tax and poor's rate strictly so called; and the liability may be further extended by the terms of the special Act.

Illustration.

(1) A railway company were required to pay “borough rate” and “county rate” as part of the poor rate, a deficiency in the assessment for which had been caused by their

works :—*Held*, that the borough rate, under 45 & 46 Vict. c. 50, s. 145, and the county rate, under 15 & 16 Vict. c. 81, s. 26, being respectively made chargeable on the poor rate, the deficiency in the assessment for the poor rate, which the promoters of the undertaking were liable to make good, included any deficiency in respect of amounts raised for borough rate and county rate, as well as any deficiency in the assessment for poor law purposes strictly so called : *Farmer v. London and North-Western Ry.* (1888), 20 Q. B. D. 788.

(2) A special Act provided that while the L. and S. W. Railway were possessed of any lands assessed or liable to be assessed to any sewers rate, main drainage rate, or general purposes rate, they should from time to time, until the railway or the works thereof were completed and assessed or liable to be assessed to the respective rates, be liable to make good the deficiency in the assessment for the respective rates :—*Held*, that the expression “general purposes rate” in this section was intended by the Legislature to apply to all rates made for general purposes, viz., for purposes in which the great majority of parishioners have a common interest, and that, under this term, the company were bound to make good the deficiency in the assessment for the metropolitan consolidated rate, the lighting rate, and the public libraries rate respectively : *Burrap v. London and South-Western Ry.* (1890), 64 L. T. 112.

(3) Upon the question whether the defendants were liable to make good to the plaintiffs the whole deficiency in the assessment to the general rate, as defined in the London Government Act, 1899, in a house and land, upon their being taken under statutory powers by the defendants until the works should be completed and assessed to the general rate, or only the deficiency in the proportion of the general rate which represented the poor rate :—*Held*, that the defendants, who had taken lands after the date when the London Government Act, 1899, came into operation, were liable to make good only the deficiency in so much of the general rate as represented the poor rate or anything chargeable on that rate, and were not liable to make good the whole of the deficiency in the general rate : *Islington Borough Council v. London School Board*, [1903] 2 K. B. 354.

V. To what lands the section applies.

Promoters may be made liable under this section in respect of lands of which they have become possessed otherwise than by virtue of this Act or the special Act or any Act incorporated therewith.

Illustration.

A railway company purchased land on which were houses, the land being situate beyond the limits of deviation and being acquired, not for the construction of the line, but to buy off the opposition of the owners to the passing of the company's special Act. It was *held* that the company could not be heard to say that they had become possessed of the houses otherwise than under their statutory powers, and that they were consequently liable to make good a deficiency in the assessments of the houses to poor rate : *Putney Overseers v. London and South-Western Ry.*, [1891] 1 Q. B. 440.

VI. When the demand for the deficiency should be made.

The demand need not be made at the time when the rates are made.

Illustration.

The defendants, the promoters, had acquired various lands in the parish of which the plaintiffs were overseers, under the powers of the Thames Embankment Act, 1863, which

incorporated the Lands Clauses Act. After some years the chairman certified that the roadway and new streets were completed. The plaintiffs then sought to enforce payment in a lump sum of the arrears of deficiency in the poor rate up to that date, and they succeeded: *Stratton v. Metropolitan Board of Works* (1874), L. R. 10 C. P. 76. "The liability, by the express terms of the clause, accrues from time to time as the rates are made; the payment is to be made on demand. Do the words 'on demand' qualify the liability or do they point to the time of payment? Do they import a condition or a duty? The argument requires us to read the words 'on demand' as if they were 'provided the deficiency be demanded,' that is, as words of condition instead of words of obligation. This is not the natural, ordinary meaning of the words": *per* Denman, J. (delivering the judgment of the Court), at p. 88, *ib.*

VII. When the liability under the section terminates.

The liability continues until the works are completed and assessed.

Illustrations.

(1) "It was evidently the intention of the Act that the defendants [the promoters] should not by taking lands throw an additional burden on the parish; it was therefore provided that they should make up the deficiency in the poor rate caused by the taking of the land for the purposes of their works; they must, therefore, pay until the works are completed and assessed. Now, it may be that when the works are completed there will be no deficiency, as the improvement may bring up the value of the remaining property to an amount equal to that of the old houses": *per* Cleasby, B., in *Wheeler v. Metropolitan Board of Works* (1869), L. R. 4 Ex. at p. 308.

(2) Under a special Act railway promoters were liable to make good deficiency in the assessment for rates "until the railway or the works thereof are completed and assessed or liable to be assessed." It was *held* that on the completion of that part of the railway which ran through any particular parish, that parish ceased to have any claim to the deficiency. Lord Chelmsford said that but for the words "liable to be assessed" (which are not in sect. 133) there would have been ground for arguing that it was intended to allow the parish either to assess the railway or to continue to collect the deficiency rate. But where the railway was "liable to be assessed," the parish was bound to make the assessment: *East London Ry. v. Whitechurch* (1874), L. R. 7 H. L. 81; overruling *R. v. Metropolitan District Ry.* (1871), L. R. 6 Q. B. 698.

(3) The Thames Embankment Act, which incorporated the Lands Clauses Act, gave power to take more land than was required for the purpose of the embankment and street improvements, and provided for the giving of a certificate of completion as evidence that the works were complete. It was *held* that the deficiency of assessment for poor rate could only be recovered up to the date of the certificate, although at that date lands not required for the street improvements remained unbuilt upon, and were not rated to the poor rate; but that as soon as any new buildings were erected on such lands and were assessed or became liable to be assessed, the rateable value of such new buildings should be credited against the deficiency: *Stratton v. Metropolitan Board of Works* (1874), L. R. 10 C. P. 76.

(4) Land taken for public improvements was used partly in the construction of new streets, the remainder being vacant, unoccupied, and unassessed pending its sale. It was *held* that the works were completed when the streets were made, and the whole of the lands which had been taken and which might become liable to assessment had become assessable; and that the deficiency must be computed from time to time until the liability ceased, by comparing, on the one hand, the assessed value at the date of the

passing of the special Act, and, on the other, the assessed value at the time of such computation of such of the lands taken as might have again become assessable, the excess, if any, of the former value over the latter being the deficiency: *Bristol Guardians v. Bristol Corporation* (1887), 18 Q. B. D. 549.

Service of Notices upon Company. **134.** And be it enacted, That any Summons or Notice, or any Writ or other Proceeding at Law or in Equity, requiring to be served upon the Promoters of the Undertaking, may be served by the same being left at or transmitted through the Post directed to the principal Office of the Promoters of the Undertaking, or One of the principal Offices where there shall be more than One, or being given or transmitted through the Post directed to the Secretary, or in case there be no Secretary the Solicitor of the said Promoters.

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I. Meaning of "any summons or notice."

The words "any summons or notice" contemplate not only proceedings in an action, but are applicable to all cases where a summons or notice is required for any purpose.

Illustration.

In the case of *In re South Yorkshire, Doncaster and Goole Ry., Ex parte Senior* (1849), 18 L. J. Q. B. at p. 334, it was argued for the company that sect. 134 only contemplates proceedings in an action; but Wightman, J., said: "I do not see that; I think it is applicable to all cases where a summons or notice is required for any purpose."

II. Meaning of "principal office."

The principal office of a company is that at which the control and management of the undertaking is carried on.

Illustrations.

(1) An Act which incorporated a company for making a railway from Dublin to Drogheda enacted that in case of any summons or writ upon the company, personal service thereof upon a secretary or clerk of the company, or leaving the same at the office of the company or of a secretary or clerk, or delivering the same to some inmate at such office or at the usual place of abode of such secretary or clerk, or in case the same respectively should not be found or known, then personal service thereof upon any other agent, &c., or on any director of the company should be deemed good service. A writ of summons

having been issued in Middlesex against the company, who had not any office in England or any secretary or clerk to represent them here, was served upon a director of the company in London :—*Held*, that such service was null and void ; that the proper service was upon the secretary or clerk at the office ; and that the parties, residing in Ireland, were not amenable to the jurisdiction of the English Court : *Evans v. Dublin and Drogheda Ry.* (1845), 14 M. & W. 142.

(2) An Act of Parliament required that notices of a particular description should be served upon corporations at their places of business :—*Held*, however, that service upon a person whom the corporation recognised as attorney and whose acts in respect of such service it had adopted, was valid to support subsequent proceedings taken upon such service : *R. v. Maryport and Carlisle Ry.* (1850), 15 L. T. (O.S.) 134.

(3) By an Act incorporating the Caledonian Railway Co., six miles of whose line are in England and the rest in Scotland, the Companies Clauses Act was incorporated with the special Act so far as was necessary for carrying out the English part of the undertaking. The principal office of the company was in Scotland, and they had no office out of Scotland except a station at Carlisle, used only for receiving passengers and goods. The plaintiff having a claim in debt against the company in respect of their amalgamation with another Scotch railway :—*Held*, that service of the writ of summons on the secretary of the company while attending a meeting in London was good service, the company being an English as well as a Scotch corporation, and the Lands Clauses Acts being incorporated : *Wilson v. Caledonian Ry.* (1850), 5 Ex. 822 ; dissented from in *Palmer v. Caledonian Ry.*, [1892] 1 Q. B. 823, *infra*.

(4) A railway company does not “carry on business” within the meaning of 9 & 10 Vict. c. 95, s. 128, at a receiving house or booking office kept by an agent for the receipt and booking of parcels and packages for all the railways generally : *Minor v. London and North-Western Ry.* (1856), 1 C. B. N. S. 325.

(5) The Great Western Railway, by the Act 5 & 6 Will. IV. c. cvii., were to have two termini, one at Bristol, the other at Paddington. Two general half-yearly meetings were to be held, one at Bristol, the other at Paddington, and an equal number of directors was to be chosen from the residents near each place. All the general business was transacted at Paddington, where the secretary resided, and where orders were issued :—*Held*, that Paddington was the only principal office of the company within the meaning of sect. 138 of the Railways Clauses Act : *Garton v. Great Western Ry.* (1858), El. Bl. & El. 837.

(6) A railway company is to be deemed to dwell at the principal office, and not at every station on the line : *Adams v. Great Western Ry.* (1861), 30 L. J. Ex. 124. Hence, in an action against the Great Western Railway, where the plaintiff dwelt more than twenty miles from Paddington, the principal office of the company, the plaintiff was *held* to be entitled to an order for costs under 15 & 16 Vict. c. 54, s. 4 : *ib.*

(7) A railway company had its principal office at Euston Square, where its seal was kept and the meetings of its directors and shareholders were held. It had also a large station at Chester, through which ran several branch lines, and the entire management of their line there was conducted by a district superintendent, under the general direction of the company at Euston Square :—*Held*, that the company did not dwell or carry on business within the district of the County Court holden at Chester : *In re Brown v. London and North-Western Ry.* (1863), 4 B. & S. 326.

(8) The G. Railway Co. were a Scotch company, and no part of their railway was in England. They had running powers over a railway and the joint use of a station, both in England, in which country their only officer was a booking clerk at that station. They had no control over the station, but only the use of it at a rental :—*Held*, that the booking clerk was not such a head officer or clerk of the company as to render

service on him of a writ issued against the company effective : *Muckereith v. Glasgow and South-Western Ry.* (1873), L. R. 8 Ex. 149.

(9) The S. Railway Co. had a station in the City of London, but their chief office was not in the City; and there the meetings of directors were held and the general business of the company carried on, the business at the City station being subject to the control of the officials at the chief office :—*Held*, that the company did not carry on business in the City of London within the meaning of sect. 12 of the Mayor's Court Extension Act, 1857 : *Le Tailleux v. South-Eastern Ry.* (1877), 3 C. P. D. 18.

(10) The C. Railway Co. had the principal part of their railway and their chief office in Scotland; a small part of the line was in England, and they had joint use of a station at C., in England, where they had goods and locomotive depôts, and an office for their district traffic superintendent. Their special Act incorporated the Companies Clauses (Scotland) Act, and also the Companies Clauses Act so far as was necessary for so much of the railway and works as were in England. A writ was served on the district superintendent at C. :—*Held*, that the writ and service must be set aside, because—(1) the company was a Scotch company, and the incorporation of the English Act for a limited purpose and the fact that a part of their railway was in England did not make them an English company; (2) the service at C. was not service at a principal office of the company, the principal office being that where the control and management of the undertaking were carried on; (3) Parliament had enacted a statutory mode of service in the Companies Clauses (Scotland) Act, and therefore Ord. IX. rule 8, did not apply : *Palmer v. Caledonian Ry.*, [1892] 1 Q. B. 823 (see also *Clokey v. London and North-Western Ry.*, [1905] 2 I. R. 251).

III. Service on the promoters' solicitor.

A company wishing that notice should be served upon its officer or at its office, and not upon its solicitors, must intimate such wish clearly and without delay; and must not lie by until after award made and then seek to set it aside as being irregular.

Illustration.

Notice of an arbitrator's appointment was not served on the company's secretary, but on their solicitors, who wrote to the plaintiffs' solicitors saying, "In our opinion the whole of the proceedings are irregular, and we return the same accordingly." It was contended that this meant that the plaintiffs should have gone to the company and served the notice on them, the solicitors having declined to accept service. No arbitrator being appointed by the company, the plaintiff gave notice of the appointment of M. as sole arbitrator, who made his award, which the company sought to set aside as irregular. Blackburn, J., said: "That is not the construction which I should put upon it. It means that the company declines to accept service, and not that the solicitors by whom they usually appear would not undertake to appear for them in this particular instance. . . . It is a mere trick and trap, for no one would put the construction upon it which the defendants now wish to do": *R. v. Metropolitan Ry.*, *Ex parte Knock* (1867), 17 L. T. 291.

IV. Misdescription of the promoters in notice.

If the misdescription is such as will not mislead the promoters it will not invalidate the notice.

Illustration.

E.'s messages being injuriously affected by the works of the "Blackburn Railway Co.," he served a clerk at their office, with a notice containing the particulars required by

sect. 68 of Lands Clauses Act, but, by mistake, addressed to "The promoters of the Blackburn and Clitheroe Railway Co." There was no railway company of the latter name, but the railway in question ran from Blackburn to Clitheroe:—*Held* that, the company not having been misled thereby, the notice was sufficient: *Eastham v. Blackburn Ry.* (1854), 9 Ex. 758.

135. And be it enacted, That if any Party shall have committed any Irregularity, Trespass, or other wrongful Proceeding in the Execution of this or the Special Act, or any Act incorporated therewith, or by virtue of any Power or Authority thereby given, and if, before Action brought in respect thereof, such Party make Tender of sufficient Amends to the Party injured, such last-mentioned Party shall not recover in any such Action; and if no such Tender shall have been made it shall be lawful for the Defendant, by Leave of the Court where such Action shall be pending, at any Time before Issue joined, to pay into Court such Sum of Money as he shall think fit, and thereupon such Proceedings shall be had as in other Cases where Defendants are allowed to pay Money into Court.

Recovery of Penalties.

And with respect to the Recovery of Forfeitures, Penalties, and Costs, be it enacted as follows:

136. Every Penalty or Forfeiture imposed by this or the Special Act, or by any Byelaw made in pursuance thereof, the Recovery of which is not otherwise provided for, may be recovered by a summary Proceeding before Two Justices; and on Complaint being made to any Justice he shall issue a Summons requiring the Party complained against to appear before Two Justices at a Time and Place to be named in such Summons; and every such Summons shall be served on the Party offending either in Person or by leaving the same with some Inmate at his usual Place of Abode; and upon the Appearance of the Party complained against, or in his Absence, after Proof of the due Service of such Summons, it shall be lawful for any Two Justices to proceed to the hearing of the Complaint, and that although no Information in Writing or in Print shall have been

Penalties to be summarily recovered before Two Justices.

exhibited before them; and upon Proof of the Offence, either by the Confession of the Party complained against, or upon the Oath of One credible Witness or more, it shall be lawful for such Justices to convict the Offender, and upon such Conviction to adjudge the Offender to pay the Penalty or Forfeiture incurred, as well as such Costs attending the Conviction as such Justices shall think fit.

[The words in italics are repealed by the Statute Law Revision Act, 1892.]

137. *If, forthwith upon any such Adjudication as* Penalties to be levied by Distress. *aforesaid, the amount of the Penalty or Forfeiture, and of such Costs as aforesaid, be not paid, the amount of such Penalty and Costs shall be levied by Distress, and such Justices or either of them shall issue their or his Warrant of Distress accordingly.*

[Sect. 137 is repealed by the Statute Law Revision Act, 1892.]

138. Where in this or the Special Act, or any Distress how to be levied. Act incorporated therewith, any Sum of Money, whether in the Nature of Penalty, Costs, or otherwise, is directed to be levied by Distress, such Sum of Money shall be levied by Distress and Sale of the Goods and Chattels of the Party liable to pay the same; and the Overplus arising from the Sale of such Goods and Chattels, after satisfying such Sum of Money and the Expenses of the Distress and Sale, shall be returned, on Demand, to the Party whose Goods shall have been distrained.

139. The Justices by whom any such Penalty Application of Penalties. or Forfeiture shall be imposed may, where the Application thereof is not otherwise provided for, award not more than One Half thereof to the Informer, and shall award the Remainder to the Overseers of the Poor of the Parish in which the Offence shall have been committed, to be applied in aid of the Poor's Rate of such Parish, *or if the Place wherein the Offence shall have been committed shall be extra-parochial then such Justices shall direct such Remainder to be applied in aid of the Poor's Rate of such extra-parochial Place, or if there shall not be*

any Poor's Rate therein in aid of the Poor's Rate of any adjoining Parish or District.

[The words in italics are repealed by the Statute Law Revision Act, 1875.]

Distress against the
Treasurer.

140. If any such Sum shall be payable by the Promoters of the Undertaking, and if sufficient Goods of the said Promoters cannot be found whereon to levy the same, it may, if the Amount thereof do not exceed Twenty Pounds, be recovered by Distress of the Goods of the Treasurer of the said Promoters, and the Justices aforesaid, or either of them, on Application, shall issue their or his Warrant accordingly; but no such Distress shall issue against the Goods of such Treasurer unless Seven Days previous Notice in Writing, stating the Amount so due, and demanding Payment thereof, have been given to such Treasurer or left at his Residence; and if such Treasurer pay any Money under such Distress as aforesaid he may retain the Amount so paid by him, and all Costs and Expenses occasioned thereby, out of any Money belonging to the Promoters of the Undertaking coming into his Custody or Control, or he may sue them for the same.

Distress not un-
lawful for Want
of Form.

141. No Distress levied by virtue of this or the Special Act, or any Act incorporated therewith, shall be deemed unlawful, nor shall any Party making the same be deemed a Trespasser, on account of any Defect or Want of Form in the Summons, Conviction, Warrant of Distress, or other Proceeding relating thereto, nor shall such Party be deemed a Trespasser *ab initio* on account of any Irregularity afterwards committed by him, but all Persons aggrieved by such Defect or Irregularity may recover full Satisfaction for the Special Damage in an Action upon the Case.

Penalties to be
sued for within
Six Months.

142. *No Person shall be liable to the Payment of any Penalty or Forfeiture imposed by virtue of this or the Special Act, or any Act incorporated therewith, for any Offence made cognizable before a Justice, unless the*

Complaint respecting such offence shall have been made before such Justice within Six Months next after the Commission of such Offence.

[Sect. 142 is repealed by the Statute Law Revision Act, 1892.]

143. It shall be lawful for any Justice to summon any person to appear before him as a Witness in any Matter in which such Justice shall have Jurisdiction under the Provisions of this or the Special Act at a Time and Place mentioned in such Summons, and to administer to him an Oath to testify the Truth in such Matter ; and if any Person so summoned shall, without reasonable Excuse, refuse or neglect to appear at the Time and Place appointed for that Purpose, having been paid or tendered a reasonable Sum for his Expenses, or if any Person appearing shall refuse to be examined upon Oath or to give Evidence before such Justice, every such Person shall forfeit a Sum not exceeding Five Pounds for every such Offence.

[Sect. 143 is repealed as to England so far as relates to any matter to which the Summary Jurisdiction Acts apply by 47 & 48 Vict. c. 43, s. 4.]

144. *The Justices before whom any Person shall be convicted of any Offence against this or the Special Act, or any Act incorporated therewith, may cause the Conviction to be drawn up according to the Form in the Schedule (C.) to this Act annexed.*

[Sect. 144 is repealed by the Statute Law Revision Act, 1892.]

145. No proceeding in pursuance of this or the Special Act, or any Act incorporated therewith, shall be quashed or vacated for want of Form, nor shall the same be removed by Certiorari or otherwise into any of the Superior Courts.

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I. Exclusion of the section. Grounds on which a certiorari will be granted.

(a) Notwithstanding the provisions of this section, a *certiorari* will be granted if there has been an excess of jurisdiction, or if there is error apparent on the face of the proceedings. But misdirection, or even a perverse verdict, is not an adequate ground for granting a *certiorari*.

Illustrations.

(1) P. C. applied for a *certiorari* to bring up a verdict and inquisition, upon the ground (*inter alia*) that the jury had ordered a fence to be erected for the benefit of P. C., besides a money compensation, instead of giving him the whole compensation in money. The application was refused, as P. C. had, at the hearing, discussed the amount of compensation proper to be given upon the supposition of the fence being erected, and it was not clear that less money had been assessed, owing to an award being made with regard to the fence: *R. v. South Holland Drainage Committee* (1838), 8 A. & E. 429; 47 R. R. 618.

(2) At an inquisition held for the assessment of compensation, the owner claimed the expense of erecting a bridge to connect his premises with the highway, which was severed by the line. The jury found a gross sum for the purchase of the lands required by the company, a sum for severance, and a sum "for severance owing to the crossing and the expense incurred thereby." Evidence was given that this last sum would be the cost of the bridge:—*Held*, that the jury ought not to have awarded the latter sum, inasmuch as that was a matter for the adjudication of justices under sect. 69 of the Lands Clauses Act; and as this was an excess of jurisdiction, a *certiorari* would lie to remove the proceedings, notwithstanding sect. 145, which takes away that writ: *South Wales Ry. v. Richards* (1849), 6 Rail. Cas. 197.

(3) Notice was given by D. to a railway company that by their works they had permanently obstructed a way to the use of which D. was entitled as appurtenant to a messuage belonging to him; and the company were required, in default of their agreeing to pay to D. a sum named, to issue their warrant to the sheriff to summon a jury to assess compensation. The company issued a warrant to the sheriff reciting the notice, stating that they did not admit D.'s right to the way, or the damages or the injurious affection, but that they were willing that the amount of the compensation should be settled as D. desired. At the inquiry evidence was given for and against the existence of the right. D. insisted that the existence of the right was to be taken for granted on the inquiry, and, further, that the right was proved. The company insisted that the right was disproved, and that the jury ought to be told that D. was not entitled to any compensation. The sheriff told the jury to say whether D. was entitled to the way, but if they negatived this, to say what was the compensation to be paid on the assumption that the right existed. The jury found that the right of way did not exist, and that on that ground D. had not sustained any damage; but, on the supposition that they were to assume its existence,

they assessed the compensation at 150*l*. This finding was specially incorporated in the verdict, and the sheriff gave judgment thereon that D. had not sustained any damage. The inquisition, verdict, and judgment were quashed, the Court *holding*—(1) that the jury, under sect. 68 of the Lands Clauses Act, had no power to inquire into the right of D. to the way, but were bound to assess compensation upon the assumption that it existed; (2) that the verdict was wholly bad, and could not be rejected as to the negating of the right but stand as to the conditional assessment of the amount: *R. v. London and North-Western Ry.* (1854), 3 El. & Bl. 443.

(4) "It is said that . . . the decision of the sheriff is made absolute and final, subject to no review whatever. The language of the 139th section of the Lands Clauses [Scotland] Act is, 'such judgment shall in no case be subject to review by suspension or advocacy or by reduction upon any ground whatever.' It is impossible that the Legislature could have meant literally that nothing should ever enable you to question a judgment of this sort by the sheriff. Suppose the sheriff's judgment had been that for the value of the land they assessed 100*l*., and because the railway company had damaged a house they assessed 1,000*l*. more. That would be absurd. What jurisdiction had they to assess any value for the house? It would be clear that in that case they would be doing something *ultra vires*, and I never can believe that that clause can be meant to apply to cases where, on the face of the proceeding, the jury are doing something that they have no authority whatsoever to do": *per* Lord Cranworth, C., in *Caledonian Ry. v. Ogilvy* (1856), 2 Macq. H. L. at p. 239.

(5) A railway passed near to certain property belonging to P., but no part of it had been taken by the railway company. P. claimed compensation, under sect. 68, for damage done to his property by the execution of the railway works, the grounds of claim being that the rentals of P.'s premises had been reduced in value by the proximity of the railway, by the noise of the traffic thereon, and by the fact that the premises were overlooked by the passengers on the railway and station-platform. At the inquisition the company objected to the reception of any evidence of damage from the proximity of the railway, or the user of it, as distinguished from the execution and construction of the works. Evidence as to these heads of claim was, however, admitted. The jury found that the premises had been injuriously affected by the execution of works, and awarded P. 105*l*. compensation, without stating the item or items upon which they had assessed it:—*Held*, that a *certiorari* must issue, the jury having been directed to include damages in respect of matters which ought to have been excluded, and there being reasonable evidence that the jury had included them: *Penny v. South-Eastern Ry.* (1857), 7 El. & Bl. 660. "If the undersheriff has directed the jury to include in their verdict damages for an item which they ought not to have included, and there is reasonable evidence that they did include such an item in making their calculation, a *certiorari* clearly lies, inasmuch as the jury have thus committed an excess of jurisdiction": *per* Lord Campbell, C.J., at p. 668, *ib*.

(6) Upon a claim for compensation for property injuriously affected by railway works, a sheriff's jury awarded compensation, and the claimant brought his action on the judgment. The proceedings were entirely regular. The defendants pleaded that the premises were not injuriously affected; that the plaintiff was not entitled to compensation, or to a flow of water claimed by him. At the trial it was shown that the plaintiff's premises had been injuriously affected to some extent, but the defendants objected that the sheriff's jury had awarded compensation for the diminution of the whole stream, and that the plaintiff was entitled to the flow of a portion only. Verdict for the plaintiff. The defendants applied for a writ of *certiorari* to bring up and quash the inquisition. The Court refused the application, there being no irregularity or excess of jurisdiction upon the face of the proceedings: *Mortimer v. South Wales Ry.* (1859), 1 El. & El. 375.

(7) The leaseholder of a house, with a forecourt abutting on a road, erected a building on the forecourt. A railway company at a later date made a trench in the road for the

purposes of their railway, the effect of which was to deprive the building of its lateral support from the adjacent land. The lessee claimed compensation, and it was found by the jury that the sinking of the ground had been caused by the erection of the building upon it, and that the lands of the claimant had not been injuriously affected by the railway works :—*Held*, that the jury had exceeded their jurisdiction : *Horrocks v. Metropolitan Ry.* (1863), 4 B. & S. 315.

(8) In proceedings under sect. 68 the jury found that the claimant was not entitled to any compensation. Upon application for a *certiorari*, Lush, J., cited *Penny v. South-Eastern Ry.* (*supra*), and *held* that the Court would not grant a *certiorari* unless there had been a clear excess of jurisdiction ; misdirection or improper reception of evidence, or even a perverse verdict, not being enough : *R. v. Halifax Corporation* (1866), 14 L. T. 447.

(9) A sheriff's jury awarding compensation to a landowner against a railway company in 1864, found that so far back as 1852 he was entitled to 5,272*l.*, saying nothing, however, as to interest. The Court of Session added twelve years' interest to the principal sum :—*Held*, that there was no power to add interest : *Caledonian Ry. v. Carmichael* (1870), L. R. 2 H. L. Sc. 56.

(10) Messrs. B. carried on business as manufacturers and sellers of wine merchants' bins and fittings at Moor Lane Square, which they had taken on a lease for twenty-one years at a rent of 200*l.* a year. They were working up their business, but it had not yet become actually profitable, and their lease, being at a rack rent, was not yet profitable to sell. The M., and M. D. Railway Companies requiring their premises, Messrs. B. had to take, at a higher rent, less convenient premises elsewhere ; and they claimed for " value of additional rent of new premises for a like term of years " and " cost of necessary alteration of new premises, and for new fixtures and for removal of and damage to stock and extra cost necessarily entailed," &c. The jury were directed that they might consider these headings of claim. Upon *certiorari* to quash the inquisition :—*Held*, with regard to the contention that the question ought to have been left to the jury whether the removal to the new premises was reasonable, that there was evidence that it was so, and that its not being left specifically to the jury was, at the worst, only misdirection, and the rule must be discharged : *R. v. Burrow*, *Times*, January 24th, 1884.

(11) On a motion for a *certiorari* to bring up and quash an inquisition it was alleged that there had been an excess of jurisdiction, as the high bailiff had withdrawn from the jury one of the heads upon which the claimants relied, and also that there had been misdirection by the high bailiff telling the jury to disregard certain evidence that the claimants had expended a large sum upon the property :—*Held*, that as the jury had viewed the premises and had all the facts before them, the application must be refused : *Streatham and General Estates Co. v. Commissioners of Works* (1888), 52 J. P. 615.

(12) If the sheriff and jury have jurisdiction in the case, " and if any evidence was before the jury which warranted the award of *any* damages, then, in such an action as this, the plaintiff *must* recover, however excessive the amount of damages, however erroneous the law laid down to the jury, however wrong the principle which they adopted " : *per* Lord Herschell in *Metropolitan Board of Works v. Howard* (1889), 5 T. L. R. 732.

(13) " But we are here discussing a question raised by the issue of a writ of *certiorari*, which writ, as it is expressly taken away by statute [*viz.*, by sect. 145], can only issue where the jurisdiction has been exceeded. If the jury had before it materials upon which it was entitled to award anything in respect of the injury actually likely to result from the establishment of the sewage works, then, as your lordships have nothing to do with the amount, you cannot say that the jurisdiction was gone, because the jury may have awarded too much or because the under-sheriff had over-stated or under-stated the result of the evidence given " : *per* Lord Halsbury, C., in *Cowper Essex v. Acton Local Board* (1889), 14 App. Cas. at p. 160.

(14) B. brought an action under the New South Wales Railway Act (22 Vict. No. 19) for lands compulsorily taken for public purposes. Conflicting expert evidence was given as to the existence of payable coal under the land. The jury found for B., with 6,000*l.* damages. On an application for a new trial on behalf of the defendants :—*Held*, that the verdict was one a jury might reasonably find, and that it could not be set aside as against the weight of evidence : *Brown v. Railways Commissioner* (1890), 15 App. Cas. 240.

(15) S., a solicitor, lived in and practised at 48, B. Road. He claimed 250*l.* for the remainder of the lease of the house and 1,500*l.* for loss of business and incidental expenses upon his house being required by the L. School Board. S. also claimed for loss of access to the river. The under-sheriff told the jury that they might give damages for loss of business profits and deprivation of access to the river and for loss of the lease of the house. The jury awarded a lump sum :—*Held*, that the under-sheriff had misdirected the jury in telling them that they could give damages for loss of access to the river, as it was included in the value of the lease, and inasmuch as the sum found was a lump sum, and it was impossible to separate the good from the bad, the inquisition must be quashed : *R. v. Seard* (1894), 10 T. L. R. 545.

(b) *Certiorari* will not lie for a mere irregularity in form.

Illustrations.

(1) Where it appeared that neither the warrant nor the inquisition stated that the owner had refused to treat, or had failed to agree with the company for the sale of his land or that the company had served the notice required by the special Act to be given, but it appeared *alivnde* that the owner had not agreed with the company and that he had had the requisite notices :—*Held*, that sufficient facts were stated in the inquisition and warrant to show the jurisdiction of the sheriff and jury : *Taylor v. Clemson* (1844), 11 Cl. & F. 610.

(2) The omission by the sheriff to strike a special jury soon enough to allow three days before the date of the inquisition for summoning them is only an irregularity, and *certiorari* does not lie : *Ex parte Great Western Ry., In re Gloucestershire (Sheriff)* (1851), 18 L. T. (O.S.) 92.

(3) The plaintiff having refused to treat with the commissioners who were authorised to take certain lands for drainage purposes, the commissioners issued a warrant to the sheriff to summon a jury to assess the compensation for 3a. 1r. 25p. of land required, but the warrant did not specify which 3r. 1r. 25p. were required. The plaintiff had 200 acres of land in the district. An inquisition was drawn up reciting the warrant, but not showing specifically in respect of which 3a. 1r. 25p. of the plaintiff's land the price was assessed :—*Held*, that the inquisition and warrant were good, for they showed everything which by the special Act was cognisable by the sheriff and inquest, although they did not, directly or by reference, specify the particular land for which the commissioners were to pay : *Ostler v. Cook* (1852), 18 Q. B. 851.

(c) If the valid part of the verdict is inseparable from the invalid, the verdict and judgment must be entirely set aside.

Illustrations.

(1) Under the Lands Clauses and Railways Clauses Acts, where the sheriff and jury, in awarding damages, go beyond their authority, the power of setting the matter right is not excluded. Thus, where the verdict was for "severance and level crossing," but without

distinguishing how much was to be for "severance" and how much for "level crossing," it being impossible to reduce the verdict *quoad* the level crossing alone, it was set aside altogether : *Caledonian Ry. v. Ogilvy* (1856), 2 Macq. H. L. 229.

R. v. Seard, ante, p. 728.

II. Disqualification of officers, &c.

(a) If the justices or sheriff are disqualified this section is inoperative, and *certiorari* will issue (*see also* sect. 24, *ante*, p. 188, and rules and illustrations there stated as to disqualification).

Illustrations.

(1) A local and personal Act empowered commissioners to levy rates, giving to parties an appeal to quarter sessions, whose order was to be final, and no order, rate, &c., was to be removed by *certiorari*. On appeal against a rate the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven to eight justices, held the evidence to be admissible. Three of the eleven justices were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate :—*Held* that, a question in the cause having been decided by a Court improperly constituted on account of the interest of the three magistrates, the clause prohibiting *certiorari* did not operate; and the Court of Queen's Bench had the order of sessions brought up by *certiorari* and quashed it on affidavits of the foregoing facts, although the affidavits did not satisfy the Court that the magistrates had not acted in good faith. But if a party to the appeal, knowing of the interest, expressly or impliedly assents to the interested magistrates acting, such party cannot afterwards make the objection : *R. v. Cheltenham Commissioners* (1841), 1 Q. B. 467.

(2) The sheriff by whom a jury had been summoned under the Lands Clauses Act for the purpose of awarding compensation for lands taken by a railway company was a shareholder in the company :—*Held*, that a *certiorari* must be granted to bring up the inquisition, as the warrant should have gone to the coroner : *R. v. London and North-Western Ry.* (1863), 12 W. R. 208.

(3) The B. Waterworks Co. were entitled to take the water of certain streams, but not till justices had certified that a certain reservoir had been completed and filled with water, and was of a given capacity. The Corporation of B. had purchased the undertaking. Two of the certifying justices were trustees of *cestui que trusts*, whose funds were invested in bonds of the corporation. The justices acted *bonâ fide*, and themselves had no pecuniary interest, but the security of the *cestui que trusts* would be improved by anything improving the waterworks :—*Held*, that the justices were not disqualified, and that *certiorari* ought to be refused : *R. v. Rand* (1866), L. R. 1 Q. B. 230.

(b) If the assessment is held before an unauthorised or disqualified person *certiorari* will not issue, where either party, knowing the fact, makes no objections at the time.

Illustrations.

(1) A local Act directed that the purchase-money of lands taken should be assessed by a jury impannelled by the sheriff or under-sheriff, or, in case they should be interested, by other persons specified, to whom a warrant was to be issued by the company, and by whom the jury and witnesses were to be sworn. It also provided that the verdict and judgment should be deposited with the clerk of the peace and be deemed records to all intents and purposes, and that no proceeding under the Act should be removed by *certiorari* :—*Held*,

that a *certiorari* would not lie to remove an inquisition, on the ground that it was taken before two persons (viz., an assessor and a clerk of the under-sheriff by whom the jury and witnesses were sworn) appointed *pro hac vice* by the sheriff, but who were not of the persons specified in the Act: *R. v. Sheffield, Ashton-under-Lyne and Manchester Ry.* (1839), 11 A. & E. 194; 52 R. R. 310.

(2) The directions in sect. 39 of the Lands Clauses Act requiring inquisitions to be held before coroners when sheriffs were interested were introduced for the protection of the party against whom they might operate, and may be waived by him. Hence, where a railway company issued their warrant to a sheriff to summon a jury to assess compensation, and the under-sheriff before whom the inquisition was to be held previous to the inquiry informed the landowner that he was a shareholder in the company, and the owner made no objection until the verdict had been given:—*Held*, that he had elected to waive the protection of the statute:—*Ex parte Baddeley* (1849), 5 Rail. Cas. 542.

(c) *Certiorari* will not issue where the proceedings are void by not being in accordance with the Act.

Illustration.

A railway Act directed that compensation for lands taken by the company in certain cases should be assessed by a special jury; that the deviation from the line of the railway mentioned in the Act should not exceed a named distance; and that no proceedings taken under the Act should be removed by *certiorari*. A *certiorari* was applied for to remove an inquisition, on affidavits that the jury appeared by the inquisition not to be special, although the case was one in which a special jury was requisite, and that there had been a deviation greater than that specified. Writ refused, because, if the proceedings were in pursuance of the Act, the *certiorari* was taken away, and if not in pursuance of the Act, they were merely void: *R. v. Bristol and Exeter Ry.* (1838), 11 A. & E. 202, n.; 52 R. R. 314.

(d) As to what is a judicial act, see the following:—

Illustration.

By a special Act a canal company were to make bridges over a canal for the convenience of landowners, as the commissioners appointed by the Act should order; but if landowners should find any of the bridges so ordered inadequate for the convenient use of the land, they were empowered, with the consent of the canal company, or, in case of their refusal for twenty-one days, then with the consent of the commissioners, to make convenient bridges at their own cost. By an entry of the commissioners' proceedings it appeared that a landowner had applied to the commissioners at a meeting convened by public notice under the Act for their sanction to the building of a bridge at his own cost, and that the commissioners, after hearing evidence for the applicant and counsel for the company in opposition to the claim, gave their consent:—*Held*, that the consent was a judicial act and that the entry of it might be brought up by *certiorari*: *R. v. Aberdare Canal* (1850), 14 Q. B. 854.

III. Practice.

(a) The objection to the *certiorari* on the ground that it does not lie, may be taken on the return: *R. v. Hatfield Percherel (Inhabitants)* (1849), 14 Q. B. 298.

(b) Excess of jurisdiction may be shown by affidavit: *Penny v. South-Eastern Ry.* (1857), 7 El. & Bl. 660.

(c) Delay in applying for the writ of *certiorari* may disentitle an applicant who, but for the delay, might have been entitled to the writ.

Illustration.

Upon an application for a writ of *certiorari* to bring up and quash the proceedings upon an inquisition as to the amount of compensation due to a claimant under the Lands Clauses Act, it was shown that the applicants for the writ had allowed five months to expire without making any objection to the proceedings:—*Held*, that as the Queen's Bench Division had laid down a rule of practice that *certiorari* ought not to be granted for the purpose of quashing an inquisition under the Lands Clauses Act, after the expiration of the time allowed for setting aside an award under that Act the Court ought not to grant the writ: *R. v. Sheward* (1880), 9 Q. B. D. 741.

146. If any party shall feel aggrieved by any Determination or Adjudication of any Justice with respect to any Penalty or Forfeiture under the Provisions of this or the Special Act, or any Act incorporated therewith, such Party may appeal to the General Quarter Sessions *for the County or Place in which the Cause of Appeal shall have arisen; but no such Appeal shall be entertained unless it be made within Four Months next after the making of such Determination or Adjudication, nor unless Ten Days Notice in Writing of such Appeal, stating the Nature and Grounds thereof, be given to the Party against whom the Appeal shall be brought, nor unless the Appellant forthwith after such Notice enter into Recognizances, with Two sufficient Sureties, before a Justice, conditioned duly to prosecute such Appeal, and to abide the Order of the Court thereon.*

[The words in italics were repealed as to England by 47 & 48 Vict. c. 43, s. 3.]

Court to make such Order as they think reasonable.

147. At the Quarter Sessions for which such Notice shall be given the Court shall proceed to hear and determine the Appeal in a summary Way, or they may, if they think fit, adjourn it to the following Sessions; and upon the hearing of such Appeal the Court may, if they think fit, mitigate any Penalty or Forfeiture, or they may confirm or quash the Adjudication, and order any Money paid by the Appellant, or levied by Distress upon his Goods, to be returned to him, and may also order such

further Satisfaction to be made to the Party injured as they may judge reasonable; and they may make such Order concerning the Costs, both of the Adjudication and of the Appeal, as they may think reasonable.

Receiver of the
Metropolitan
Police District to
receive Penalties
incurred within
his District.

148. Provided always, *and be it enacted*, That notwithstanding anything herein or in the Special Act, or any Act incorporated therewith, contained, every Penalty or Forfeiture imposed by this or the Special Act or any Act incorporated therewith, or by any Byelaw in pursuance thereof, in respect of any Offence which shall take place within the Metropolitan Police District, shall be recovered, enforced, accounted for, and, except where the Application thereof is otherwise specially provided for, shall be paid to the Receiver of the Metropolitan Police District, and shall be applied in the same Manner as Penalties or Forfeiture, other than Fines upon drunken Persons, or upon Constables for Misconduct, or for Assaults upon Police Constables, are directed to be recovered, enforced, accounted for, paid, and applied by an Act passed in the Third Year of the Reign of Her present Majesty, intituled An Act for regulating the Police Courts in the Metropolis, and every Order or Conviction of any of the Police Magistrates in respect of any such Forfeiture or Penalty shall be subject to the like Appeal and upon the same Terms as is provided in respect of any Order or Conviction of any of the said Police Magistrates by the said last-mentioned Act; and every Magistrate by whom any Order or Conviction shall have been made shall have the same Power of binding over the Witnesses who shall have been examined, and such Witnesses shall be entitled to the same Allowance of Expenses as he or they would have had or been entitled to in case the Order, Conviction, and Appeal had been made in pursuance of the Provisions of the said last-mentioned Act.

NOTE:—The Act referred to is The Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71). The words in italics, “and be it enacted,” were repealed by the Statute Law Revision Act, 1891.

Penalties recovered before two justices sitting in the Metropolitan Police district under the powers given by 3 & 4 Vict. c. 84, s. 6.

Illustration.

"Sect. 6 of 3 & 4 Vict. c. 84 extends the power, duties and privileges of the police magistrates to justices having jurisdiction within the [Metropolitan] Police District under certain circumstances ; but it does not enact that penalties recovered before such justices shall be considered as recovered before one of the [Metropolitan] police magistrates, nor that a moiety shall go to the receiver of the Metropolitan Police District" : *per Cockburn, C.J.*, in *Metropolitan Police District Receiver v. Bell* (1872), L. R. 7 Q. B. 433.

Persons giving
false Evidence
liable to Penalties
of Perjury.

149. And be it enacted, That any person who upon any Examination upon Oath under the Provisions of this or the Special Act, or any Act incorporated therewith, shall wilfully and corruptly give false Evidence, shall be liable to the Penalties of wilful and corrupt Perjury.

Access to Special Act.

And with respect to the Provision to be made for affording Access to the Special Act by all Parties interested, be it enacted as follows :

Copies of Special
Act to be kept and
deposited, and
allowed to be
inspected.

150. The Company shall, at all Times after the Expiration of Six Months after the passing of the Special Act, keep in their principal Office of Business a Copy of the Special Act, printed by the Printers to Her Majesty, or some of them ; and where the Undertaking shall be a Railway, Canal, or other like Undertaking, the Works of which shall not be confined to One Town or Place, shall also within the Space of such Six Months deposit in the Office of each of the Clerks of the Peace of the several Counties into which the Works shall extend a Copy of such Special Act so printed as aforesaid, and the said Clerks of the Peace shall receive, and they and the Company respectively shall retain, the said Copies of the Special Act, and shall permit all persons interested to inspect the same, and make Extracts or Copies therefrom, in the like Manner and upon the like Terms, and under the like Penalty for Default, as is provided in the Case of certain

Plans and Sections by an Act passed in the First Year of the Reign of Her present Majesty, intituled An Act to compel Clerks of the Peace for Counties and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.

NOTE:—The Act referred to is The Parliamentary Documents Deposit Act, 1837 (7 Will. IV. & 1 Vict. c. 83).

151. If the Company shall fail to keep or deposit, as herein-before mentioned, any of the said Copies of the Special Act, they shall forfeit Twenty Pounds for every such Offence, and also Five Pounds for every Day afterwards during which such Copy shall be not so kept or deposited.

Penalty on Company failing to keep or deposit.

152. *And be it enacted*, That this Act shall not extend to Scotland.

Act not to extend to Scotland.

153. *And be it enacted*, That this Act may be amended or repealed by any Act to be passed in the present Session of Parliament.

Act may be amended this Session.

[The words in italics in sect. 152 and sect. 153 are repealed by the Statute Law Revision Act, 1875.]

SCHEDULES REFERRED TO IN THE FOREGOING ACT.

SCHEDULE (A.).

Form of Conveyance.

I of in consideration of the Sum of paid to me [*or, as the Case may be*, into the Bank of England [*or Bank of Ireland*], in the name and with the Privity of the Accountant General of the Court of Chancery, ex parte “The Promoters of the Undertaking” [*naming them*], or to A.B. of and C.D. of Two Trustees appointed to receive the same], pursuant to the [*here name the Special Act*], by the [*here name the Company or other Promoters of the Undertaking*], incorporated [*or constituted*] by the said Act, do hereby convey to the said Company [*or other Description*], their

Successors and Assigns all [*describing the Premises to be conveyed*], together with all Ways, Rights, and Appurtenances thereto belonging, and all such Estate, Right, Title, and Interest in and to the same as I am or shall become seised or possessed of, or am by the said Act empowered to convey, to hold the Premises to the said Company [*or other Description*], their Successors and Assigns, for ever, according to the true Intent and Meaning of the said Act. In witness whereof I have hereunto set my Hand and Seal, the Day of in the Year of our Lord .

SCHEDULE (B.).

Form of Conveyance on Chief Rent.

I of in consideration of the Rent-charge to be paid to me, my Heirs and Assigns, as herein-after mentioned, by "The Promoters of the Undertaking" [*naming them*], incorporated [*or constituted*] by virtue of the [*here name the Special Act*], do hereby convey to the said Company [*or other Description*], their Successors and Assigns, all [*describing the Premises to be conveyed*], together with all Ways, Rights, and Appurtenances thereunto belonging, and all my Estate, Right, Title, and Interest in and to the same and every Part thereof, to hold the said Premises to the said Company [*or other Description*], their Successors and Assigns, for ever, according to the true Intent and Meaning of the said Act, they the said Company [*or other Description*], their Successors and Assigns, yielding and paying unto me, my Heirs and Assigns, One clear yearly Rent of by equal quarterly [*or half-yearly, as agreed upon,*] Portions, henceforth, on the [*stating the Days*], clear of all Taxes and Deductions. In witness whereof I hereunto set my Hand and Seal, the Day of in the Year of our Lord

SCHEDULE (C.).

Form of Conviction.

to wit.

Be it remembered, That on the Day of in the Year of our Lord A.B. is convicted before us C., D., Two of Her

Majesty's Justices of the Peace for the County of [here describe the Offence generally, and the Time and Place when and where committed], *contrary to the* [here name the Special Act]. *Given under our Hands and Seals, the Day and Year first above written.*

C., D.

[Schedule (C.) is repealed by the Statute Law Revision Act, 1892.]

(B) THE INCLOSURE ACT, 1852 (15 & 16 VICT. c. 79).

Application of
Compensation for
Common Rights
paid under the
Lands Clauses
Consolidation Act,
1845.

22. Where any Money shall have been or may hereafter be paid to a Committee under "The Lands Clauses Consolidation Act, 1845," or under any Railway or other Special Act by which Money may have been directed or authorized to be paid to a Committee, as Compensation for the Extinction of Commonable or other Rights, or for Lands being Common Lands or in the Nature thereof, the Right to the Soil of which may have belonged to the Commoners, and such Committee shall be of opinion that the Provisions of such Act for the Apportionment thereof cannot be satisfactorily carried into effect, such Committee may make Application in Writing to the Commissioners to call a Meeting of the Persons interested in such Compensation Money for the Appointment of Trustees of such Compensation Money and for the Investment thereof, and for the Application of the Interest and annual Produce thereof to such Purposes for the Benefit of the Persons interested therein as the Commissioners shall approve; and if the said Commissioners shall think fit to proceed with such Application they shall call a Meeting accordingly, and the Decision of the Majority in number and the Majority in respect of Interest of the Persons present at such Meeting shall bind the Minority and all absent Parties: Provided always, that if no Instructions shall be resolved upon, or in case the Commissioners shall deem such Instructions unjust or unreasonable, they may, by an Order under their Seal, give such Instructions for the Investment of such Compensation Money and for the

Application of the Income thereof as they shall think fit; and such Order under the Seal of the Commissioners, or the Order approving of such Instructions as aforesaid, shall contain Provisions for the Appointment of new Trustees from Time to Time, and Copies of such Order shall be deposited and kept in like Manner as Copies of an Award are by the firstly hereinbefore recited Act directed to be deposited and kept, and the said Committee shall be absolutely discharged from all Liability in respect of such Compensation Money upon Payment thereof to the said Trustees, who shall, out of such Money, in the first place pay and discharge all Expenses which may be incurred by the said Commissioners in respect of or in any way incident to such Application and Order, and apply or invest the Surplus thereof in such Manner as shall by such Order be authorized or directed.

NOTE.—The Act referred to is The Inclosure Act, 1845 (8 & 9 Vict. c. 118).

(c) THE INCLOSURE ACT, 1854 (17 & 18 VICT. c. 97).

15. Where any Money shall have been or may hereafter be paid to a Committee under “The Lands Clauses Consolidation Act, 1845,” or under any Railway or other Special Act by which Money may have been directed or authorized to be paid to a Committee as Compensation for the Extinction of Commonable or other Rights, or for Lands, being Common Lands or in the Nature thereof, the Right to the Soil of which may have belonged to the Commoners, and the Majority of such Committee shall be of opinion that the Provisions of such Act for the Apportionment thereof cannot be satisfactorily carried into effect, such Majority may make Application in Writing to the Commissioners to call a Meeting of the Persons interested in such Compensation Money, to determine whether or not such Compensation Money shall be apportioned under the Provisions of this Act.

Application of
Compensation for
Common Rights
paid under 8 & 9
Vict. c. 18.

Money to be paid
into Bank of
England.

16. If the Majority in Number and Interest shall resolve that such Compensation Money shall be apportioned, the Amount of such Compensation Money shall be forthwith paid into the Bank of England, to the Credit of an Account to be named by the Inclosure Commissioners for England and Wales; and the said Committee shall be absolutely discharged from all Liability in respect of such Compensation Money, upon Payment thereof into the Bank of England as herein-before directed.

NOTE.—The powers of the Inclosure Commissioners are now exercised by the Board of Agriculture under 52 & 53 Vict. c. 30.

Interests to be
ascertained by
Commissioners.

17. As soon as the said Monies shall have been paid into the Bank as aforesaid, the said Inclosure Commissioners, or any Assistant Commissioner appointed or to be appointed by them for that Purpose, shall proceed to ascertain, determine, and award the Names of the Parties who were entitled to such Estates, Rights, and Interests in the said Common and Commonable Lands, and the Amount of Value of their respective Shares, Rights, and Interests therein, and the proportionate Amount of the Price so to be paid as aforesaid for such Estates, Rights, and Interests to which each Party so entitled as aforesaid is entitled, in respect of his Share, Right, or Interest as aforesaid; and the Award of the Commissioners under their Common Seal, or Assistant Commissioner in Writing under his Hand and Seal, shall be binding on all Parties claiming such Estates, Rights, and Interests as aforesaid; and for the Purpose of ascertaining the Rights and Interests of such Parties as aforesaid it shall be lawful for the said Inclosure Commissioners or Assistant Commissioner to call such Meetings as they or he shall think fit of all Persons having or claiming any such Rights or Interests in the said Common and Commonable Lands as aforesaid, at such Time and Place as the said Commissioners or Assistant Commissioner shall think fit, so as the same shall be appointed by a public Notice thereof in Writing to be affixed at least Twelve Days before such Meeting on the principal outer Door

of the Parish Church in which such Land or any Part is situate ; and to be inserted in One of the Public Newspapers published or generally circulated in the County in which such Land is situate ; and at such Meeting the said Commissioners or Assistant Commissioner do and shall proceed to examine into and ascertain all and every the Claims which shall be made or put forward in respect of any such Rights or Interests as afore-said, and the relative and proportionate Value of the Estates, Rights, and Interests of any Person or Persons claiming to be entitled thereto, and for that Purpose do and may employ any Valuer or Surveyor, and call for and receive such Records, Deeds, and Writings, and such other Proof or Evidence, as the said Commissioners or Assistant Commissioner may think fit ; and they and he are and is hereby authorized and required to take the Testimony of any Witnesses upon Oath (which Oath they and he are and is respectively hereby empowered to administer), or to take the Affirmation of such Witnesses in Cases where Affirmation is allowed by Law instead of Oath.

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I. The committee of commoners, or in case of difficulty the Board of Agriculture, is the proper tribunal to decide who is entitled to share in the compensation money, and in what proportions.

Illustration.

A district council under statutory powers took common lands. The compensation was agreed, meetings of the commoners were held and a committee appointed. R., who claimed to be solely entitled to the commonable lands, brought an action for a declaration that he was entitled to the whole of the compensation money :—*Held*, that the committee, or in case of difficulty the Board of Agriculture, was the proper tribunal to decide who were entitled to the compensation and in what shares : *Richards v. De Winton, Richards v. Evans*, [1901] 2 Ch. 566. On appeal to the Court of Appeal the parties agreed upon the appointment of a referee to inquire who was entitled and in what proportions : S. C. [1902] W. N. 113.

NOTE.—The appeal was afterwards dismissed on the finding of the arbitrator, without any judgment on the question of jurisdiction : S. C., [1903] 1 Ch. 507.

II. Where it is impracticable to apportion on the strict basis the proportions in which the commoners are entitled to share, it is a proper mode of apportionment to give equal shares to those entitled.

Illustration.

The arbitrator appointed to inquire (1) as to who were the persons entitled to share in compensation paid for the extinction of lammas rights, and (2) in what proportions, reported that an inquiry based on the value of the winter eatage of the several tenements was impracticable; and that under the circumstances the maxim "Equality is equity" should be observed and the compensation money be divided into as many equal shares as there were tenements:—*Held*, that this mode of distribution was proper and convenient: *Weatherley v. Layton* [1892] W. N. 165.

18. All the Costs and Expenses of the said Inclosure Commissioners and Assistant Commissioner, and of any Valuer or Surveyor employed by them or him under the Provisions herein-before contained, shall, in the first place, be paid out of such Compensation Monies, and the Residue of the said Monies shall be paid and divided between and amongst the said several Parties to be named in the said Award, and in the Shares and Proportions to be ascertained and set forth in such Award.

Compensation for limited Interests to be paid to Trustees.

19. When it shall appear to the Commissioners or Assistant Commissioner that any of the Parties entitled to such Rights or Interests are only entitled thereto for a limited Interest, then it shall be lawful for them or him, by their or his Award, to direct that the Monies to be paid in respect of such Right or Interest, where the same shall exceed Twenty Pounds, shall be paid to the Trustees acting under the Will, Conveyance, or Settlement under which such Person having such limited Interest shall be interested in such Rights or Interests, and where there are no Trustees then into the Hands of Trustees to be appointed under the Hands and Seal of the Commissioners, to be held by them on Trusts similar to the Uses or Trusts to which such Rights or Interests had been immediately before the Payment of such Monies into the Bank subject to, or as near thereto as the said Commissioners or Assistant Commissioner can ascertain; and the Receipts of any Trustees to whom any such Monies shall be paid as aforesaid shall be good and sufficient Discharges for the same: Provided always, that the Payment of all such Sums shall from Time to Time be subject

to such Rules and Regulations, for the Purpose of ensuring the Payment thereof to the Person or Persons duly entitled to receive the same, as the said Commissioners shall by any Order direct.

As to Sums payable in respect of Lands not exceeding 20*l*.

20. In all Cases where the Sum payable by virtue of such Award, in respect of any Estate, Right, or Interest, shall not exceed Twenty Pounds, and the Person entitled to such Estate, Right, or Interest shall be under any Disability, or Incapacity, such Sum shall and may be paid to the Guardian, Committee, or Husband of such Person; and where any such Person shall have a limited Interest only in such Estate, Right, or Interest, the whole of such Sum shall and may, nevertheless, be paid to the Person having such limited Interest, to his or her Guardian, Committee, or Husband, as the Case may be.

(D) THE LANDS CLAUSES CONSOLIDATION ACTS AMENDMENT ACT, 1860 (23 & 24 VICT. c. 106).

An Act to amend the Lands Clauses Consolidation Acts (1845) in regard to Sales and Compensation for Land by way of a Rentcharge, Annual Feu Duty or Ground Annual, and to enable Her Majesty's Principal Secretary of State for the War Department to avail himself of the Powers and Provisions contained in the same Acts.

[20th August, 1860.]

Preamble recites 8 & 9 Vict. cc. 18, 19.

Sect. 1 (repealing 8 & 9 Vict. c. 18, s. 10, in part) is repealed as spent by 38 & 39 Vict. c. 66 (S. L. R.).

Sects. 10 and 11 of recited Act, as to Power to sell, &c. Lands for an annual Rentcharge, and to recover, extended to all Sales, &c. where Parties are under Disability.

2. The Power to sell and convey Lands in consideration of an annual Rentcharge provided by the Tenth Section of the said Act, and the Power to recover such Rentcharge provided by the Eleventh Section of the said Act, are hereby extended to all Cases of Sale and Purchase or Compensation under the said Act where the Parties interested in such Sale or entitled to such Compensation

are under any Disability or Incapacity, and have no Power to sell or convey such Lands, or to receive such Compensation, except under the Provisions of the said Act.

4. In every Case of such Sale or Compensation by any Parties other than Parties seised in Fee or entitled to dispose absolutely of the Lands so sold or damaged, the Amount of such Rentcharge, Annual Feu Duty or Ground Annual, herein-before mentioned, shall be settled in the Manner directed in the Ninth Section of each of the said Acts respectively: Provided, that the Amount of such Annual Rentcharge, Annual Feu Duty or Ground Annual, shall in no Case be less than One Fourth Part greater than the net annual Rent received by the Parties beneficially interested in such Lands upon an Average of the last Seven Years; and that a Charge of Five per Cent. on the gross Sum estimated or fixed as aforesaid, by way of Compensation for any Damage that may be done to the said Lands, shall, in all such Cases be added to and shall form a Part of the said Rentcharge, Annual Feu Duty or Ground Annual; and that no Fine, Foregift, Grassum, Premium, or other Consideration in the Nature thereof, shall be paid or taken in respect of the Lands so sold or damaged, other than the annual Rentcharge, Annual Feu Duty or Ground Annual made payable for such Lands: Provided also, that such Rentcharge shall be and remain upon and for the same Uses, Trusts, and Purposes as those upon which the Rents and Profits of the Land so conveyed stood settled or assured at or immediately before the Conveyance thereof, and shall be a First Charge on the Tolls and Rates, if any, payable under the Special Act.

Amount of Rent-charge to be settled in manner directed in the 9th Section of recited Acts.

If Lands purchased by way of Rentcharge, borrowing Powers to be reduced proportionally.

5. In case the Promoters of the Undertaking shall be empowered, by any Act or Acts relating thereto, to be passed after the passing of this Act, to borrow Money to an Amount not exceeding a prescribed Sum, then in the event of the Promoters of the Undertaking agreeing at any Time after the

passing of this Act with any Person under the Powers of this Act and of either of the Acts herein-before mentioned, or of either of the said Acts, only for the Purchase of any Lands in consideration of the Payment of a Rentcharge, Annual Feu Duty, or Ground Annual, the Powers of the Promoters of the Undertaking for borrowing Money shall be reduced by an Amount equal to Twenty Years Purchase of any Rentcharge, Annual Feu Duty or Ground Annual, so for the Time being payable.

Sect. 6 is repealed, except as to Ireland, by 55 & 56 Vict. c. 19 (S. L. R.).

Power to Secretary for War to use the Powers given to Promoters of Undertakings by 8 & 9 Vict. c. 18.

7. For the Purchase or Acquisition of any Messuages, Lands, Tenements, and Hereditaments wanted for the Service of the Admiralty or of the War Department or for the Defence of the Realm, it shall be lawful for Her Majesty's Principal Secretary of State for the War Department for the Time being to use all or any of the Powers and Provisions by the Lands Clauses Consolidation Act, 1845, and by the Lands Clauses Consolidation (Scotland) Act, 1845, given to Promoters of the Undertaking, as therein mentioned, and for such Purposes the said Principal Secretary shall be deemed and taken to be the Promoters of an Undertaking within the Meaning of the said Act, and all the Powers and Provisions thereof shall, if used by Her Majesty's Principal Secretary of State for the War Department, be treated as if they were contained in the Fifth and Sixth Victoria, Chapter Ninety-four, for the Purpose of being used and made available by the Principal Officers of Her Majesty's Ordnance, and had been transferred to the said Principal Secretary for the Time being by the Eighteenth and Nineteenth Victoria, Chapter One hundred and seventeen, for the Purposes aforesaid : Provided always, that nothing herein contained shall authorize any Purchase otherwise than by Agreement of any Land, except according to the Provisions of the Twenty-third Section of the said Act of the Fifth and Sixth Victoria, or prejudice or affect the Powers and Authorities of the said Principal Secretary for

the Time being under the said last-mentioned Statutes or either of them.

This Act and
8 & 9 Vict. c. 18 &
19 to be construed
together.

8. This Act shall be read and construed as Part of the said Lands Clauses Consolidation Act, 1845, or of the Lands Clauses Consolidation (Scotland) Act, 1845, in all Matters in which it relates to the said Acts respectively ; and in citing this Act in other Acts of Parliament, and in legal Instruments, it shall be sufficient to use the Expression of “The Lands Clauses Consolidation Acts Amendment Act, 1860.”

(E) THE LANDS CLAUSES CONSOLIDATION ACT, 1869
(32 & 33 VICT. c. 18).

An Act to amend the Lands Clauses Consolidation Act.

[24th June, 1869.]

Whereas it is expedient that the provisions contained in “The Lands Clauses Consolidation Act, 1845,” should be amended :

Be it therefore enacted and declared by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Costs of arbitrations,
where either party
so requires, to be
settled by a master
of Superior Courts.

1. *Where in England, under “The Lands Clauses Consolidation Act, 1845,” or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the Superior Courts of Law ; and such fees may be taken in respect of the taxation as may be fixed in pursuance of the enactments relating to the fees to be demanded and taken in the offices of such masters, and all those enactments, including the enactments*

relating to the taking of fees by means of stamps, shall extend to the fees in respect of the said taxation.

NOTE.—Sect. 1 has been repealed by the Lands Clauses (Taxation of Costs) Act, 1895 (58 & 59 Vict. c. 11, *post*), but was substantially re-enacted thereby. Sect. 2 was repealed by the Statute Law Revision Act, 1883.

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I. Taxation of costs by a master.

The Court will grant a mandamus commanding the master to tax when he has entirely declined to act; but if he has acted, although wrongly, the Court will not direct a certiorari to issue, for the master has jurisdiction.

Illustrations.

(1) "I think that the only ground on which we can ever exercise jurisdiction in a matter of taxation is this, that the office of taxing costs to the successful party entitled is the business of the Court itself. . . . But where the Legislature thinks proper to give the power of taxation, and imposes the duty of taxation, not on the Court, but simply on one of the officers of the Court, without in any way rendering it necessary that the Court should interfere, it seems to me a case in which we have not any authority over the master. I agree with what Erle, J., said in the Bail Court, that the office performed by the master has reference to the causes in the Court, and is part of the necessary and incidental proceedings of the Court, and that therefore the Court had jurisdiction over it. That does not apply to the case now before us, in which the authority is derived, not from the Court itself, but from the act of the Legislature in giving the power to the master and imposing the duty on him": *per* Cockburn, C.J., in *Owen v. London and North-Western Ry.* (1867), L. R. 3 Q. B. at p. 60.

(2) On July 12th, 1871, a railway company served notice to treat upon G. On November 25th, 1871, they served notice of their intention to summon a jury, and offered 315*l.* for the land. On December 5th, 1871, G. gave notice that he desired to proceed to arbitration, that he claimed 900*l.*; and appointed X. his arbitrator. On December 12th the company nominated their arbitrator and gave G. notice thereof. The time for making the award was enlarged until March 1st, 1872. On January 23rd, 1872, the valuer (duly appointed) reported the value to be 472*l.* This sum the company verbally offered to G. on March 1st, and he accepted, subject to payment of costs. On March 13th a written offer of 472*l.* was made and refused. The umpire afterwards awarded G. 447*l.*:—*Held* that, as the offer was too late, the master was bound to tax the costs: *In re Gray and North-Eastern Ry.* (1876), 1 Q. B. D. 696.

(3) "There is no ground for an application for a *mandamus*, for the master has not declined jurisdiction; neither can the Court grant a writ of *certiorari*, because the master has jurisdiction, and he has exercised it. The main question is—Has the Queen's Bench Division jurisdiction to review the master's taxation? I am quite satisfied with the reasons given in *Owen v. London and North-Western Ry.*, L. R. 3 Q. B. 54, that there is no jurisdiction to review the master's taxation. . . . I think that although the section [*i.e.*, sect. 1 of the Lands Clauses Act, 1869] increases the number of taxing masters, and the fees are to be paid in a different manner, these alterations do not give us the power to review the master's taxation. It is impossible to say that in the case of compensation being settled by arbitration we have power to review the taxation, but in the case where compensation is assessed by the jury, we have no power": *per* Bramwell, L.J., in *Sandback Charity Trustees and North Staffordshire Ry.* (1877), 3 Q. B. D. at p. 3.

(4) "It certainly would be very inconvenient if the rule of law stood thus: You are first to go before the master, and then, if the master pleased he might tax the costs *ex parte*, having, of course, previously given notice to the promoters; in that case, what he had done would be all thrown away if it turned out that they were not liable to pay costs at all. That would be very inconvenient. On the other hand, the master might say, I have been told that I have no jurisdiction, and I will not tax, until I am told that I am wrong. Upon that it might be said, You may go and get a *mandamus* against the master compelling him to tax. Upon that the railway promoters might contend that it certainly would be more convenient to do it when the dispute as to the right was decided. They might say, Ascertain the right first, and then when it is ascertained that you have a right to costs, and not till then, go to the master and tax them": *per* Lord Blackburn in *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. at p. 444.

(5) The certificate of the taxing master in a taxation under the Lands Clauses (Taxation of Costs) Act cannot be quashed on *certiorari*, as the function of the master in taxing such costs is not judicial, but merely ministerial: *R. v. Goff*, [1905] 2 I. R. 121.

II. Review of master's taxation.

The Court has no jurisdiction to review a master's taxation, as he is the person to whom the duty of taxing is expressly delegated by the Act.

Illustration.

A railway company took certain property belonging to charity trustees and offered 1,500*l.* compensation. On June 30th, 1870, the trustees claimed 6,510*l.* On December 7th, 1874, the parties agreed to go to arbitration, and 3,650*l.* were awarded. The costs were taxed by a master under sect. 1 of the Lands Clauses Act, 1869. The trustees being dissatisfied with the taxation, applied to the Queen's Bench Division to review it. The application was refused and the refusal upheld on appeal: *In re Sandback Charity Trustees and North Staffordshire Ry.* (1877), 3 Q. B. D. 1.

III. Taxation where the right to costs does not exist.

Illustration.

The master is under no obligation by virtue of sect. 1 of the Lands Clauses Act, 1869, to tax costs when the claimant is not, having regard to the facts of the case, entitled to costs under sect. 34 of the Lands Clauses Act, 1845: *In re Fitzhardinge (Lord) and Gloucester and Berkeley Canal* (1872), L. R. 7 Q. B. 776.

IV. Inapplicability of section.

This section does not apply in cases where the arbitration, by agreement, embraces matters outside the provisions of the Lands Clauses Acts.

Illustration.

The M. Board of Works agreed with Messrs. D. and one S. (*inter alia*) to convey certain land to Messrs. D. and carry out certain works, and that Messrs. D. should convey certain land to the Board. The price to be paid for each parcel of land was to be determined by an arbitrator, and it was further agreed that the costs and expenses to be incurred by Messrs. D. should be paid to them by the Board, and that the amount thereof should, in case of difference, be determined by the arbitrator. Messrs. D. having delivered their bill of costs to the Board, an appointment was obtained by the latter from a master to tax these costs under sect. 1 of the Lands Clauses Act, 1869. At the appointment it was contended by Messrs. D. that the arbitrator was the proper person to tax the costs. The master then declined to proceed with the taxation. Afterwards Messrs. D. obtained an appointment from the arbitrator for the purpose of settling the amount of the costs. Both parties attended the appointment, but the Board objected that the master, and not the arbitrator, was the proper person to tax the costs. The arbitrator thereupon declined to settle the amount of the costs:—*Held*, that sect. 1 of the Lands Clauses Act, 1869, applies only to arbitrations pure and simple within the Lands Clauses Act, and did not apply to such a case as the present: *Doulton v. Metropolitan Board of Works* (1870), L. R. 5 Q. B. 333.

V. Right to costs.

The right to costs conferred by the Lands Clauses Act, 1845, will be deemed to exist unless expressly taken away by the special Act.

Illustration.

Where a special Act provided that the provisions of the Lands Clauses Act, 1845, were to apply to all matters under it, "except where expressly varied by the special Act," but was silent as to how costs were to be awarded under it:—*Held*, that the claimant in the case was entitled to his costs, for the mere substitution of a different form of arbitration from that prescribed in the general Act did not have the effect of repealing the provisions in the Act of 1845 as to costs: *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. 425 (compare *Doulton v. Metropolitan Board of Works*, *supra*). See also *ante*, p. 225.

VI. Right of action to recover costs.

Illustration.

Held, that the right to recover costs was wholly independent of the taxation of them, and that an action lay to recover them, even when the amount of them had not yet been settled or ascertained, by taxation: *Metropolitan District Ry. v. Sharpe* (1880), 5 App. Cas. 425.

VII. Taxation of costs under Solicitors Acts.

Illustration.

A municipal corporation demanded of W. a statement in writing of the particulars of his estate and interest in certain lands required for a sewage farm. W. duly made his

claim for compensation, which, it was agreed, should be determined by arbitration. It was further agreed that W. should give immediate possession, and that the corporation should pay W. all his costs of and incidental to the agreement, reference and arbitration, and to the conveyance of the lands. Upon an application to have W.'s bill of costs taxed under the Lands Clauses Act, 1869 :—*Held*, that the parties had contracted themselves out of that Act, and that the costs might be taxed under 6 & 7 Vict. c. 73, s. 38 : *Wombwell v. Barnsley Corporation* (1877), 36 L. T. 708.

VIII. Costs of uncertified solicitor.

Illustration.

Compensation having been awarded to F., an application was made to a master to tax his costs and disbursements. It was then objected that one L., who had acted for F. as his solicitor, had not taken out his certificate to practice during the progress of the arbitration, and that therefore F. could not recover his costs. The master refused to proceed with the taxation :—*Held*, that a *mandamus* to the master commanding him to tax the costs must be refused : *Fowler v. Monmouthshire Ry. and Canal* (1879), 4 Q. B. D. 334.

IX. Taxation of costs under Arbitration Act, 1889.

Illustration.

By clause (i.) of Sched. I. of the Arbitration Act, 1889, it is provided that “the costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid, and may tax and settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client” :—*Held*, that the amount of the costs so to be paid must be ascertained and stated in the award itself, and that otherwise costs of the reference and award, including the arbitrators’ fees, are liable to taxation in the usual manner : *In re Prebble and Robinson*, [1892] 2 Q. B. 602.

3. Where any lands by the special Act authorised to be taken are situate within the city and liberty of Westminster, then, with respect to those lands, in every case in which any question of disputed compensation is required by the Lands Clauses Consolidation Act, 1845, or any Act amending the same, to be determined by the verdict of a jury, the high bailiff of the city and liberty of Westminster, or his deputy, shall be deemed to be substituted for the sheriff throughout such of the enactments of the Lands Clauses Consolidation Act, 1845, and any Act amending the same as relate to the reference to a jury.

Provision re-
specting lands in
Westminster.

Short title. Con-
struction of Acts. **4.** This Act may be cited as “The Lands
Clauses Consolidation Act, 1869,” and shall
be construed as one with the Lands Clauses
Consolidation Act, 1845, and the Lands Clauses Consolidation
Acts Amendment Act, 1860, and these Acts and this Act may
be cited together as the Lands Clauses Consolidation Acts,
1845, 1860, and 1869.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 23, it is pro-
vided that in any Act passed after the year 1889, unless the contrary
intention appears, the expression “Lands Clauses Acts” shall mean,
(a) as respects England and Wales, the Lands Clauses Consolidation Act,
1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Lands
Clauses Consolidation Act, 1869, and the Lands Clauses (Umpire) Act,
1883, and any Acts for the time being in force amending the same.

(F) THE COMMONABLE RIGHTS COMPENSATION ACT, 1882
(45 & 46 VICT. c. 15).

Application of
compensation
money for common
lands. **2.—(1)** With respect to any money which has
been or hereafter may be paid by any railway
or other public company or corporate body or
otherwise under the provisions of the Lands
Clauses Act and any Act incorporated therewith, or of any
other Act of Parliament to a committee of commoners as com-
pensation for the extinguishment of commonable or other
rights or for lands being common lands or in the nature
thereof the right to the soil of which may belong to the
commoners, the committee (or a majority in number thereof)
or, after the expiration of twelve months from the payment of
such money to the committee, any three of the persons claim-
ing to be interested in such money may make application in
writing to the Commissioners to call a meeting of the persons
interested in such money to consider the application thereof,

and the Commissioners shall call a meeting accordingly, and at such meeting the majority in number and the majority in respect of interest of the persons present may decide by resolution that such moneys shall be applied and laid out in one or more of the following ways :

- (a) In the improvement of the remainder of the common land in respect of a portion of which such money has been paid ;
- (b) In defraying the expense of any proceedings under the Metropolitan Commons Acts or under the Inclosure Acts, 1845 to 1878, with reference to a scheme for the local management, or a Provisional Order for the regulation, of such common land, or of any application to Parliament for a Private Bill or otherwise for the preservation and management of such common land as an open space ;
- (c) In defraying the expense of any legal proceedings for the protection of such common land, or the commoners' rights over the same ;
- (d) In the purchase of additional land to be used as common land ;
- (e) In the purchase of land to be used as a recreation ground for the neighbourhood ;

and any such resolution shall bind the minority and all absent parties, and the Commissioners shall make an order under their seal for the payment to them of any expenses incurred by them in relation to the matter, and (subject to such payment) for the application of the money according to such resolution, and the committee or the persons in whose names such money stands or is invested, or the survivors or survivor in account of such persons, or the legal personal representative of such survivor, shall, upon service of any such order of the Commissioners as aforesaid upon them or any of them or any person on their behalf as the Commissioners may direct, pay and apply the said money or realise any security in which the same is invested, and pay and apply the proceeds thereof in manner directed by the said order.

(2) Any land so purchased as aforesaid for use as common land shall be conveyed to and vest in trustees upon trusts for the persons interested, such trustees to be appointed, and such trusts, and the powers and duties of the trustees, and provisions for the appointment of new trustees from time to time to be declared and provided by an order under the seal of the Commissioners, pursuant to resolutions to be passed at a special meeting of the persons interested, convened by the said Commissioners by such majorities as aforesaid.

(3) Every appointment of a new trustee or of new trustees, in pursuance of this Act, shall be subject to confirmation by the Commissioners under their seal, and upon such confirmation the land shall vest in the remaining and the newly appointed trustees without any conveyance.

(4) The Commissioners shall publish such notice of any meeting held under this Act, and frame such rules and give such directions for the conduct of such meetings and the service of orders made by them under this Act as they may deem fit, and may, if they think fit, direct an assistant commissioner appointed by them to preside at any such meeting, and any such meeting may be adjourned from time to time.

(5) Any land so purchased as aforesaid for use as recreation ground shall be conveyed to and vest in the local authority as specified in the schedule to this Act for the district within which such land is situate, and shall be held and managed by such local authority, subject to and in accordance with the provisions relating to recreation grounds respectively contained in the Inclosure Acts, 1845 to 1878.

Application of
compensation
money for
recreation grounds
and field gardens.

3. Any moneys heretofore paid or hereafter to be paid by any railway or other public company or body corporate or otherwise under the provisions of the Lands Clauses Act, 1845, and any Act incorporated therewith, or of any other Act of Parliament, to any local authority as specified in the schedule to this Act or to the churchwardens and overseers of a parish in

respect of any recreation ground or allotment for field gardens taken under the powers of any such Act or Acts of Parliament shall be applied in manner provided by the Inclosure Acts, 1845 to 1878, as amended by the Commons Act, 1879, with respect to the surplus rents arising from recreation grounds and field gardens respectively.

NOTE.—The Act referred to is 42 & 43 Vict. c. 37.

4. In any case where money paid by way of compensation as aforesaid has, before the passing of this Act, been applied in any one or more of the ways authorised by this Act, a resolution may be passed, at any meeting of the persons interested, called by the Commissioners in manner provided by this Act, by such majorities as aforesaid approving of such application, and such application shall, upon the allowance of such resolution by the Commissioners under their seal, be deemed to have been lawfully made under the provisions of this Act; and the committee or other persons by whom such money has been so applied shall thereupon be discharged from all liability in respect of such money so applied. And the provisions in this Act contained with respect to the declaration of trusts, and the powers and duties of trustees, and the appointment of new trustees, from time to time, shall apply in every case in which such money has, before the passing of this Act, been laid out in the purchase of land.

Provision for cases where money paid by way of compensation has already been applied in the manner authorized by this Act.

NOTE :—This section is spent.

5. Copies of all orders made by the Commissioners under this Act shall be deposited and kept in like manner as copies of an award are by the Inclosure Act, 1845, directed to be deposited and kept.

Deposit of Orders.

6. This Act shall not extend to the New Forest.

Exception of the New Forest.

SCHEDULE.

SITUATION OF LAND.	LOCAL AUTHORITY.
Within the Metropolis	The Metropolitan Board of Works [now the London County Council].
Not within the Metropolis, but within the district of an urban sanitary authority, as defined by the Public Health Act, 1875, or any Act amending the same.	The urban sanitary authority.
Elsewhere than within the Metropolis or the district of an urban sanitary authority as above defined.	The churchwardens and overseers of the parish.

(G) THE LANDS CLAUSES (UMPIRE) ACT, 1883
(46 & 47 VICT. c. 15).

An Act to amend the Lands Clauses Consolidation Act, 1845.
[18th June, 1883.]

Whereas it is expedient that the provisions contained in the Lands Clauses Consolidation Act, 1845, in relation to the appointment of umpires should be amended :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Amendment of
sect. 28 of 8 Vict.
c. 18, extending
the power of ap-
pointment of
umpire by Board
of Trade.

1. *The following words in section twenty-eight of the Lands Clauses Consolidation Act, 1845, are hereby repealed, that is to say, "in any case in which a railway company shall be one party to the arbitration, and two justices in any other case," and that section shall, in relation to the appointment of any umpire under*

the provisions thereof after the passing of this Act, apply as if such words were omitted, and the same section shall accordingly be read and have effect as follows :

28. If in either of the cases aforesaid the said arbitrators shall refuse or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, the Board of Trade shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final.

NOTE.—The preamble and in the above sect. 1 the words “the following words in” and from “are hereby” to “same section” and the word “accordingly” have been repealed by 61 & 62 Vict. c. 22 (S. L. R.).

Short title.

2. This Act may be cited as the Lands Clauses (Umpire) Act, 1883.

(H) THE LANDS CLAUSES (TAXATION OF COSTS) ACT, 1895
(58 & 59 VICT. c. 11).

An Act to amend the Law relating to the Taxation of Costs under the Lands Clauses Acts. [14th May, 1895.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1.—(1) Where under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by the verdict of a

Fees for taxing costs in compensation inquiries and arbitrations.
8 & 9 Vict. c. 18.

jury, or by arbitration, the costs of and incidental to the inquiry or to the arbitration and award (as the case may be), shall, if either party so requires, be taxed and settled as between the parties by one of the masters of the Supreme Court, and such fees shall be taken in respect of the taxation as may be fixed in pursuance of the enactments relating to the fees to be taken in the offices of those masters ; and all those enactments (including the enactments relating to the taking of fees by means of stamps) shall extend to the fees in respect of such taxation.

(2) Section forty-five of the Regulation of Railways Act, 1868, and section one of the Lands Clauses Consolidation Act, 1869, are hereby repealed.

NOTE.—Sect. 1, sub-sect. (1), is substantially a reproduction of sect. 1 of the Lands Clauses Act, 1869, *ante* ; see the cases thereunder. See also Lands Clauses Act, 1845, s. 34, *ante*, p. 229.

In the expression “one of the masters of the Supreme Court,” a master of the Chancery Division is included.

Illustration.

Where costs had been taxed by a Chancery taxing master :—*Held*, that as the Chancery taxing master’s office was amalgamated with the Central Office, and as they themselves were transferred thereto as from January 11th, 1902, by general rules made under the Supreme Court of Judicature (Officers) Act, 1879, they have now jurisdiction to tax the costs of an inquiry before a jury under the Lands Clauses Act : *Covington v. Metropolitan District Ry.*, [1902] 1 K. B. 231.

Short title.

2. This Act may be cited as the Lands Clauses (Taxation of Costs) Act, 1895.



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